UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In the Matter of the Petition of WATERMAN STEAMSHIP CORPORATION, a corporation, owner of the vessel SS CHICKASAW, for exoneration from and limitation of liability.	
GAY COTTONS, INC., et al., Cargo Claimants, SALOM BABY WEAR, Cargo Claimant, UNITED STATES OF AMERICA, Cargo Claimant.	NO. 21767

ANSWERING BRIEF OF

APPELLEE UNITED STATES OF AMERICA

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TABLE OF CONTENTS

CASES

TEXTS

STATUTES AND REGULATIONS

STATUTES AND REGULATIONS CITED

The Carriage of Goods by Sea Act, Title 46 U.S.C.

§ 1304. Rights and immunities of carrier and ship.

(1) Unseaworthiness.

Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

(2) Uncontrollable causes of loss.

Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from--

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the

navigation or in the management of the ship;

* * * * *

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

* * * * *

(4) Deviations.

Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this chapter or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: Provided, however, That if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable.

* * * * *

(6) Inflammable, explosive, or dangerous cargo.

Goods of an inflammable, explosive, or dangerous

nature to the shipment whereof the carrier, master or agent of the carrier, has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

Limitation of Vessel Owner's Liability, Title 46 U.S.C.

§ 183. Amount of liability; loss of life or bodily injury; privity imputed to owner; "seagoing vessel."

(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss,

damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

* * * * *

(e) In respect of loss of life or bodily injury the privity or knowledge of the master of a sea-going vessel or of the superintendent or managing agent of the owner thereof, at or prior to the commencement of each voyage, shall be deemed conclusively the privity or knowledge of the owner of such vessel.

Telegraphs, Telephones, and Radiotelegraphs, Title 47 U.S.C. § 351. Vessels required to install equipment.

(a) Except as provided in section 352 of this title, it shall be unlawful--

* * * * *

(2) For any ship of the United States of sixteen hundred gross tons, or over, to be navigated outside of a harbor or port, in the open sea, or for any such ship of the United States or any foreign country to leave or attempt to leave any harbor or port of the United States for a voyage in the open

sea, unless such ship is equipped with an efficient radio direction finding apparatus (radio compass) properly adjusted in operating condition as hereinafter provided, which apparatus is approved by the Commission: Provided, That the Commission may defer the application of the provisions of this section with respect to radio direction finding apparatus to a ship or ships between one thousand six hundred and five thousand gross tons for a period not beyond November 19, 1954, if it is found impracticable to obtain or install such direction finding apparatus.

Title 47 C.F.R.

§ 8.516 Direction-finder. Each ship of 1600 gross tons or over which is subject to the requirement set forth in subparagraph (a)(2) of section 351 of the Communications Act or which is subject to Regulation 12 of Chapter V of the Safety Convention shall be equipped with an efficient direction-finder (radio compass) properly adjusted in operating condition and approved by the Commission.[1/]

1/ This regulation, with minor changes, is now set forth at 47 C.F.R. § 83.458.

§ 8.517 Requirements for direction-finder. (a) To be approved by the Commission, as provided by § 8.516, the radio direction-finder (radio compass) shall:

* * * * *

(b) The calibration of the direction-finder shall be verified whenever any changes are made in the physical or electrical characteristics or the location of any antenna(s) on board the vessel, or whenever any changes are made in any structure(s) on deck, which might appreciably affect the accuracy of the direction-finder. The calibration particulars shall be checked at yearly intervals or as near thereto as possible. A record of the calibration of any checks made of their accuracy shall be maintained on board the vessel for a period of not less than 1 year from the date of the related action.[2/]

Title 46 C.F.R. 96.27--Sounding Equipment

§ 96.27-1 When required.

(a) All mechanically propelled vessels in ocean or coastwise service of 500 gross tons and over, and all mechanically propelled vessels in Great Lakes

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2/ This regulation, with minor changes, is now set forth at 47 C.F.R. § 83.459.

service of 1,500 gross tons and over, except paddle wheel vessels, shall be fitted with an efficient mechanical or electronic deep-sea sounding apparatus in addition to the deep-sea hand leads. On Great Lakes vessels, a shallow water alarm may be substituted.3/

3/ As published in 23 Federal Register 4676, June 26, 1958.

OPINION BELOW

The opinion of the District Court, Honorable Jesse W. Curtis, United States District Judge for the Central District of California, is reported at 265 F.Supp. 595, 1966 A.M.C. 2219.

JURISDICTIONAL STATEMENT

The jurisdiction of the Court below was founded upon 28 U.S.C. 1333 and former Rules 51 to 55 of the Supreme Court Rules of Practice in Admiralty and Maritime Cases (since July 1, 1966, Supplemental Rule F, Fed. R. Civ. P.).

Jurisdiction of this Court rests upon 28 U.S.C. 1292 (3) (see further Rule 73 [h], Fed. R. Civ. P.) by reason of a Notice of Appeal (R. 919), filed December 22, 1966, "from the Interlocutory Decree entered in this action on October 25, 1966."

STATEMENT OF THE CASE

To the extent the pertinent facts are not set forth in this brief, Appellee United States adopts the statement of the case in the answering brief of Appellee Gay Cottons.

ARGUMENT

I

The Lower Court's Denial of Exoneration from or Limitation of Liability by Reason of Waterman's Delegation of Authority to the Master and Waterman's Direct Fault is in Full Accord with Existing Law.

A. Nondelegability under COGSA/Harter Act and Appellant's Argument based thereon.

It has been settled law for years in Harter Act and COGSA cases that as between a shipowner and cargo the former's duty of making its ship seaworthy is a nondelegable one. Hence, the shipowner cannot defend on the basis that it had made a contract with a repair yard to repair and overhaul the vessel and that the yard had failed to perform its contract. It can only defend by showing that the yard had in fact performed its contract. Bethlehem Shipbuilding Corp. v. Joseph Gutradt Co., 10 F.2d 769, 771 (9th Cir. 1926); Standard Oil Co. v. Anglo-Mexican Petroleum Corp., 112 F.Supp. 360, 367 (SDNY 1953). Nor can the shipowner defend on the ground that the lack of due diligence to make and keep the ship fit and seaworthy was that of the vessel's master and crew. The Bill, 47 F.Supp. 969, 975-976 (D.Md. 1952), affirmed 145 F.2d 470 (4th Cir. 1944); The James Griffiths, 84 F.2d 785, 786 (9th Cir. 1936); Texas & Gulf SS Co. v. Parker, 263 Fed. 864 (5th Cir. 1920);

International Navigation Co. v. Farr & Bailey Mfg. Co., 181 U.S. 226, 45 L.Ed. 830 (1900).[4] (As to incompetence of the master precluding exoneration, see The Cygnet, 126 Fed. 742, 746 [1st Cir. 1903].)

> "There 'must be due diligence in the work itself, and not merely in the selection of agents to do the work; otherwise, shipowners might escape all responsibility merely by selecting agents of good reputation, and would be relieved (of liability) whether such agents exercised due

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4/ "... The obligation was to use due diligence to make her seaworthy before she started on her voyage, and the law recognizes no distinction founded on the character of the servants employed to accomplish that result.

"We repeat that, even if the loss occur through fault or error in management, the exemption cannot be availed of unless the vessel was seaworthy when she sailed, or due diligence to make her so had been exercised; and it is for the owner to establish the existence of one or the other of these conditions. The word 'management' (in §3, Harter Act, 46 U.S.C. 192) is not used without limitation, and is not, therefore, applicable in a general sense as well before as after sailing." International Navigation Co. v. Farr & Bailey Mfg. Co., supra, 181 U.S. at 226, 45 L.Ed. at 833-834.

care or not to make their vessel seaworthy, and any responsibility would be frittered away.'" Standard Oil Co. v. Anglo-Mexican Petroleum Corp., supra, 112 F.Supp. at 368.

Appellant insists that the Court below denied limitation of liability under 46 U.S.C. 183 (Conclusion of Law No. 3) because it had found, in Finding of Fact (hereinafter abbreviated as FF) No. 6, a breach of "COGSA's non-delegable duty to make seaworthy." It assigns this alleged basis for the finding as error. See Specification of Errors No. 3, p. 7, Opening Brief. See also Summary of Argument, p. 11, Opening Brief. Since the Trial Court found more than that the CHICKASAW left port in an unseaworthy condition and causation[5/], Appellant's position in this regard, in order to make sense, must be taken to be that the master's omission in regard to the maintenance of seaworthiness is attributable to the shipowner solely in COGSA and Harter Act cases because only under those statutes

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5/ Findings that the vessel left port in an unseaworthy condition and that this was one of the causes of the loss are all that is necessary for denial of exoneration under COGSA. On appeal, these findings must be affirmed unless clearly erroneous. Artemis Maritime Co. v. Southwestern Sugar & Molasses Co., 189 F.2d 488, 490-491 (4th Cir. 1951). See also The Bill, supra, 47 F.Supp. at 975.

is the duty to use due diligence to prepare the vessel for sea nondelegable; that proof that the unseaworthiness was due to an omission of the master entitles Appellant to limitation as the master is not an "executive officer, manager, or superintendent" whose omissions cause denial of limitation.[6/]

6/ This argument is very similar to that unsuccessfully made by the shipowner attempting limitation under 46 U.S.C. 183 in Petition of the United States (The Edmund Fanning), 105 F.Supp. 353, 369 (SDNY 1952), modified on other grounds 201 F.2d 281 (2d Cir. 1953):

> "It is urged on behalf of Isbrandtsen (the shipowner) that even though it be found that Captain Praast was acting in such a capacity for Isbrandtsen as to preclude it from claiming exoneration under the Fire Statute, the evidence establishes that the home office of Isbrandtsen in New York had no knowledge of the improper stowage and that it was not done at their specific direction or expressed approval. But it has been found that Captain Praast was performing with authority duties of a managerial nature rather than merely functioning in a technical or clerical capacity. He was employed by Isbrandtsen in a capacity to make it chargeable with his faults and neglects. Cf. Williams S.S. Co., Inc. v. Wilbur, 9 Cir., 9 F.2d 622, certiorari denied 271 U.S. 666, 46 S.Ct. 482, 70 L.Ed. 1140;

As for the denial of exoneration itself, Appellant attacks this conclusion only insofar as causality is based on the deposition of Third Officer Jensen (p. 19, Opening Brief) and as it relates to cargo loaded aboard the CHICKASAW prior to December 25, 1961 (p. 20, Opening Brief).

In dedicating itself to these propositions of law, however, Appellant makes a significant omission: it fails to attack as clearly erroneous under the McAllister rule[7] any of the findings of fact in the case, which findings clearly establish more than adequate grounds for denial of both exoneration and limitation. Thus, as to unseaworthiness and causality, it was found by the Trial Court that the CHICKASAW's fathometer was unseaworthy "at the

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6/ cont'd.
Great Atlantic & Pacific Tea Co. v. Lloyd Brasileiro, 2 Cir., 159 F.2d 661. Isbrandtsen is privy to the faults of Captain Praast so as to preclude it from claiming the benefits of the Limitation of Liability Act as well as the Fire Statute."

7/ McAllister v. United States, 348 U.S. 19, 99 L.Ed. 20 (1954); Admiral Towing Co. v. Woolen (The Companion), 290 F.2d 641, 646 (1961); States SS Co. v. United States (The Pennsylvania), 259 F.2d 458, 466, 1957 A.M.C. 2277 (9th Cir. 1957).

commencement of the voyage from each port in the Far East" (FF 4) because of long-standing neglect (FF 4) and a failure to have a specific malfunction repaired which had been observed on December 25, 1961, by Third Officer Jensen (FF 4) and reported to the master, Captain Patronis, and that the vessel was lost because of this unseaworthiness (FF 6).

The unseaworthiness was found to have been "with the privity, fault and knowledge of Waterman" (FF 6). FF 4 regarding the lack of general maintenance of the fathometer was the basis for the finding as to Waterman's direct fault.[8/] However, as another basis for the conclusion

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8/ Waterman chooses to argue that "only one negligent act is found. That act was the failure of Captain Patronas (sic) to exercise due diligence to make the fathometer seaworthy when, with knowledge of uncertainty with respect to its condition, he took no steps to repair or check it [Finding of Fact (5) R. 847]. Thus, limitation of liability could properly be denied only if Captain Patronas' negligence under the law is imputed to Appellant. Finding of Fact (6) R. 848 makes it explicit that no supervisory or managerial personnel were involved in Captain Patronas' negligence." (Opening Brief, p. 46.)

A fair reading of the findings, including FF 4, which

that Waterman was not entitled to limitation, it was also found that the CHICKASAW's master had been delegated by the shipowner the "managerial responsibility" of making the vessel seaworthy as to her navigational equipment, "including authority to decide whether repairs should be made," in foreign ports such as Yokohama where the company had no "supervisory or managerial personnel" (FF 6), that the CHICKASAW's master had failed to perform the above-mentioned managerial duty before commencement of the CHICKASAW's voyage across the Pacific (FF 5) and that his failure to make the vessel seaworthy was within the privity and knowledge of Waterman (FF 6).

It is clearly apparent, therefore, that the Trial Court covered all the elements needed for denial of limitation under the Limitation of Liability Act: loss due

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8/ cont'd.

is not mentioned by Appellant in this regard, shows that this interpretation is incorrect and is an attempt to attack the finding of direct fault in a novel way: by treating it as non-existent. The record, as we will set out later, clearly shows why the finding of direct fault was made.

to negligence or fault of the shipowner, or occurring with the knowledge of the shipowner, or to which it is in privity.9/

9/ "The right to limit liability turns upon whether such negligence was with the owner's privity or knowledge." Spencer Kellogg & Sons v. Hicks (The Linseed King), 254 U.S. 502, 510, 76 L.Ed. 903, 911 (1931). Also, the owner who is directly at fault cannot have the benefit of limitation.

> "It was not the intention of congress, by the provisions of sections 4283-4285 of the Revised Statutes, embodying provisions of the act of March 3, 1851, nor of any act amendatory thereof, to relieve shipowners of responsibility for their own willful or negligent acts." Parsons v. Empire Transp. Co., 111 Fed. 202, 208 (9th Cir. 1901).

See also American Car & Foundry Co. v. Brassert, 289 U.S. 261, 264, 77 L.Ed. 1162, 1165 (1932).

Further, since the American Limitation of Liability Act is based on the English statute (In re Eastern Transp. Co. [The Calvert], 37 F.2d 353, 363 [D.Md. 1929]; see also Deslions v. Cia. Gen. Transatlantique [The La Bourgogne], 210 U.S. 95, 120, 52 L.Ed. 973, 986 [1907]), we are entitled to examine English cases. (The English statute allows the shipowner limitation of liability for "any loss or damage happening without his actual fault or privity."

B. Privity and Knowledge under the Limitation of Liability Act are Imputable to the Shipowner through an Employee such as the Vessel's Master when the Latter has been Delegated a Managerial Responsibility.

While corporate shipowners are denied limitation of liability under 46 U.S.C. 183(a) for the neglect of the managing officers, these are defined as "anyone to whom the corporation has committed the general management or general superintendence of the whole or a particular part of its business." Petition of United States (The Edmund Fanning), 105 F.Supp. 353, 371 (SDNY 1952), modified on other grounds 201 F.2d 281 (2d Cir. 1953); The Marguerite,

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9/ cont'd.

[See 11 Brit. Shipping Laws 323.]) In The Lady Gwendolen [1965] 1 Lloyd's List L.R. 335, 338 (C.A.), affirming [1964] 2 Lloyd's List L.R. 99, which case was called to the attention of the Court below, "Mr. Justice Hewson, a very experienced Admiralty Judge, ... found that the owners have not established that the loss occurred without their actual fault. No question of privity (therefore) arises." (The fault there was that of the owners in not exercising sufficient control over the master in matters of navigation by means of radar, since "the installation of radar requires particular vigilance of owners." [At p. 339.])

140 F.2d 491, 493, 1944 A.M.C. 367 (7th Cir. 1944); In re Petition of Henry Du Bois' Sons Co., 189 F.Supp. 400, 402 (SDNY 1960). The "part of the business" with which we are concerned in this particular appeal is the keeping of navigational equipment aboard a vessel in a state of repair. (This function was found by the Court below--and properly so[10/]--to be part of the managerial duty to make seaworthy; again, the finding has not been assigned as error.)

The shipowner, corporate or otherwise, cannot escape liability by means of the Limitation of Liability Act by giving a managerial function to an employed person acting as its agent. For purposes of establishing the shipowner's "privity or knowledge" under that Act, such a person is a "managing officer".

10/ "The tug owner has a duty ... to send the vessel out prepared to meet conditions which are likely to befall the vessel. It is the owner's duty to see to it that a vessel's equipment is in safe working order." Greater New Orleans Expressway Commission v. Tug Claribel, 222 F.Supp. 521, 1964 A.M.C. 967, 973 (ED La. 1963), citing In re Jacobson (The Edward), 52 F.2d 179, 1931 A.M.C. 1541 (SD Tex. 1931). Tug Claribel (sub nom. Coleman v. Jahncke Service, Inc.) was aff'd 341 F.2d 956 (5th Cir. 1965).

"While the cases generally speak of the knowledge of managing officers as being the knowledge of the corporation, the real test is not as to their being officers in a strict sense, but as to the largeness of their authority." In re P. Sanford Ross, 204 Fed. 248, 251 (2d Cir. 1913).

See also Austerberry v. United States (The C.G.R. 180), 169 F.2d 583, 594, 1948 A.M.C. 1682, 1699 (6th Cir. 1948) and Gilmore & Black, The Law of Admiralty (1957), pp. 698-699.

"... the scope of authority delegated by an individual owner to a subordinate may be so broad as to justify imputing privity (citation) as well as knowledge." Coryell v. Phipps (The Seminole), 317 U.S. 406, 411, 87 L.Ed. 363, 368 (1942).

Were the law otherwise, a shipowner could evade his responsibilities by assigning the task of making the ship seaworthy to mere employees. The courts have said over and over that this cannot be done. The Supreme Court did so in Spencer Kellogg & Sons v. Hicks (The Linseed King), 285 U.S. 502, 509-510, 76 L.Ed. 903, 911 (1931). This Circuit so stated in two cases, one being The Silver Palm, 94 F.2d 776, 780, 1937 A.M.C. 1462, 1469 (9th Cir. 1937):

"In proceedings for limitation the owner may not escape liability by giving the managerial functions to an employed person acting as its agent, whether the person be corporate or otherwise. So far as concerns privity and knowledge, such an agent is its alter ego."

In States SS Co. v. United States (The Pennsylvania), 259 F.2d 458, 470, 1957 A.M.C. 2277 (9th Cir. 1957), this above quote from The Silver Palm is repeated (minus the last sentence).

The Fifth Circuit agrees: "Where, as here, the owner is a corporation, privity or knowledge attributable to management (or those to whom the authority of management has been delegated) binds the corporation." Coleman v. Jahncke Service, Inc. (Tug Claribel), 341 F.2d 956, 958 (5th Cir. 1965). So does the Sixth Circuit. Austerberry v. United States (The C.G.R. 180), supra, 169 F.2d at 594; Cleveland Tankers, Inc. v. Szwed (The Cleveco), 154 F.2d 605, 613, 1946 A.M.C. 933 (6th Cir. 1946); In re Great Lakes Transit Corp. (The Glenbogie), 81 F.2d 441, 444, 1936 A.M.C. 267 (6th Cir. 1936). And the Seventh Circuit as well. The Marguerite, 140 F.2d 491, 493 (7th Cir. 1944). The Second Circuit and the Southern District of New York, where most of the admiralty decisions in the United States emanate, agree. Great Atlantic & Pacific Tea Co. v. Brasiliero,

159 F.2d 661, 664 (2d Cir. 1947), cert. denied sub nom. Repub. of United States of Brazil v. Great Atlantic & Pacific Tea Co., 331 U.S. 836, 91 L.Ed. 1849 (1947); In re New York Dock Co., 61 F.2d 777, 779 (2d Cir. 1932); In re Petition of Henry Du Bois' Sons Co., 189 F.Supp. 400, 401-403 (SDNY 1960); Petition of United States (The Edmund Fanning), supra, 105 F.Supp. at 364, 369, 370.

In another Southern District of New York case, The Argent, 1940 A.M.C. 508, 508-519 (1915), Judge Hough ruled:

> "The ground of limitation (and the only ground) is that the damage was occasioned 'without the privity or knowledge' of the Phoenix San & Gravel Company.
>
> "Let it be admitted (as I think it must be) that an owner may be liable by reason of a negligent or erroneous act concerning which he has neither privity nor knowledge. It may be admitted also as is suggested in Mr. Martin's brief, that exposition of the meaning of the words 'privity' and 'knowledge' has never gone beyond that given us by Putnam, D. J. in Quinlan vs. Pew, 56 Fed. at 116 et seq. The Court there said: 'We therefore conclude that the word "privity" as found in this statute includes at least as much as the word "knowledge," but we of

course do not overlook the fact that there is in law imputed knowledge, and therefore there may be imputed privity.'

"It is this imputation of knowledge or privity or both that petitioner cannot in my opinion get over in this proceeding.

"The philosophy of shipowners' limitation seems to me this: There are so many things which shipowners must do by deputy, and must have done at great distances and under circumstances where human fallibility is peculiarly prone to produce error, that they have long been saved by statute from the consequences of their agents' acts. (This view I have tried to elaborate in Julia Luckenbach, opinion filed Dec. 30, 1914, 235 Fed. 388, at pp. 393-396.)

"It would, however, be a very easy matter for an owner to shelter himself behind an actual ignorance if lack of personal knowledge always constituted a good defence to the extent of the protection accorded by statute. If lack of actual knowledge were enough, imbecility, real or assumed, on the part of owners, would be at a premium. Such assumption of ignorance would be peculiarly easy on the part of corporate owners. Corporate

owners have of late years greatly multiplied, and it is accordingly found that the doctrine of imputed knowledge and imputed privity has grown to meet the demands of business.

"In this case I think it conclusively proven that no officer of the petitioning corporation knew that the Argent maintained an unlawful light; but for the matter of that, they did not know whether she maintained a light at all; they did not regard it as any part of their business to ascertain whether that humble vessel was complying with the law or violating it every day.

* * * * *

"As long ago as Republic, 61 Fed. 109 (2d Cir. 1894), knowledge of what owners could have seen if they had looked was imputed to them. The same doctrine is assumed in Tommy, 142 Fed. 1034 (SDNY 1905); it is assumed in Re Smith, 193 Fed. 395 (2d Cir. 1911), and fully applied under circumstances which in substance are very like this in Re Sandford

Ross, 204 Fed. 248 (2d Cir. 1913).[11]

"Parsons vs. Empire Transportation Co., 111 Fed. 202 (9th Cir. 1901), certiorari denied 183 U.S. 699, is authority for considering Conway as the managing agent or alter ego of the corporation. Personally I prefer the doctrine of imputed knowledge, but the result is the same."

The shipowner cannot sustain its burden of proof under the Limitation of Liability Act by proving that it picked a competent person to whom to give a managerial function. Negligence of the employee to whom the delegation had been made would still be that of the shipowner. Spencer Kellogg & Sons v. Hicks (The Linseed King), supra, 285 U.S. at 511, 76 L.Ed. at 912; Austerberry v. United States (The C.G.R. 180), supra, 169 F.2d at 594; States SS Co. v. United States (The Pennsylvania), supra, 259 F.2d at 472; The City of Brunswick, 6 F.Supp. 597, 602 (D. Mass. 1934); In re Jacobson (The Edward), supra, 52 F.2d at 180;

11/ "Knowledge" as used in the Limitation of Liability Act means "not only personal cognizance but also the means of knowledge of which a party must avail himself in order to prevent a condition likely to produce or contribute to a loss." Greater New Orleans Expressway Commission v. Tug Claribel, supra ftn.10, 222 F.Supp. at 524, 1964 A.M.C. at 972. See also The Cleveco, supra, 154 F.2d at 613.

Petition of the United States (The Edmund Fanning), supra, 105 F.Supp. at 369. The Limitation of Liability Act does not even require actual knowledge of the employee to whom the delegation of managerial responsibility was made. Limitation must be denied if the person exercising the managerial function could by the exercise of ordinary care have discovered the fault. Austerberry v. United States (The C.G.R. 180), supra, 169 F.2d at 594.

> "The statute does not require that knowledge be actual; it may be imputed if someone in charge for the owner had general authority to act for him and by the exercise of ordinary care could have discovered the fault." In re Great Lakes Transit Corp. (The Glenbogie), supra, 81 F.2d at 444.

See also In re New York Dock Co., supra, 61 F.2d at 779.

Where the master himself is delegated the managerial duty of maintaining the vessel in safe condition, then his knowledge is that of the corporate owner, i.e., is imputed to that owner. Austerberry v. United States (The C.G.R. 180), supra, 169 F.2d at 594; Hockley v. Eastern Transportation Co., 10 F.Supp. 908, 913, 1935 A.M.C. 155

(D. Md. 1935).[12/]

Just as he must under COGSA or the Harter Act, the shipowner under the Limitation of Liability Act has the burden of showing who had been delegated the duty of keeping the vessel in safe condition and that this person had actually carried out that duty according to the practices of the reasonably competent shipowner. States SS Co. v.

12/ See Sperry Flour Co. v. Coastwise SS Co. (The James Griffiths), 84 F.2d 785, 1936 A.M.C. 1196 (9th Cir. 1936), p. 786 of which is cited, with other cases, by Judge Denman in The Silver Palm, supra, 94 F.2d at 780, for the proposition that, in a limitation proceeding, the shipowner may not escape liability by giving managerial functions to an employed person acting as its agent, for, so far as privity and knowledge are concerned, such an agent is its alter ego. The James Griffiths, also written by Judge Denman, at that page states that "the duty of the owner, here performed through the Master, to exercise due diligence in making the vessel seaworthy as to her personnel, particularly, as here, her Chief Mate, is one of the owner's highest obligations." From what we read in the case, The James Griffiths was decided under the Harter Act and exoneration granted, so that the limitation issue was not reached, but Judge Denman still considered the ruling pertinent to limitation.

United States (The Pennsylvania), supra, 259 F.2d at 468. And the care required of the shipowner does not terminate when the ship leaves her home port. The performance of the duty to make her seaworthy before departure for sea exists at way ports as well as at the home port. Any other interpretation of the Limitation Act would be reading into it a condition which is not expressed or even implied by its terms. See Petition of United States (The Edmund Fanning), supra ftn. 6, where the voyage (to the Far East) originated at Bremen but the negligence making the ship unseaworthy to the owner's privity and knowledge occurred at her next port of call, Antwerp. The ship subsequently was destroyed at Genoa. See also Deslions v. Cia. Gen. Transatlantique (The LaBourgogne), 210 U.S. 95, 133-136, 52 L.Ed. 973, 990-991 (1908) and The Black Eagle, 87 F.2d 891, 894 (2d Cir. 1937), which hold, for purposes of determining under 46 U.S.C. 183(a) and 184 (which are in "pari materia", according to The LaBourgogne) what shall constitute the "freight then pending" for the voyage during which the casualty occurred, that the return trip is an entirely new voyage. The ship, therefore, can within the contemplation of the Limitation Act begin a new voyage from ports other than her home port. Nevertheless, as we show subsequently, the duty of the shipowner to make the vessel seaworthy for purposes of the Limitation Act exists wherever the owner can exercise control.

This would certainly include such well-developed way ports as Yokohama (where the CHICKASAW was December 21-22, 1961, and January 25-26, 1962), Pusan, Korea (December 30-January 7), and Hong Kong (January 9-12). (FF 2[b])

C. Failure to Exercise Due Diligence Causing Denial of Exoneration can also Constitute Negligence Within the Privity or Knowledge of the Shipowner, thus Causing Denial of Limitation.

The inescapable conclusion from the authorities referred to above is that limitation may be denied where there has been a failure to exercise due diligence causing denial of exoneration under COGSA and the Harter Act.[13/] It is therefore immaterial whether we say that the duty of the owner to make the vessel seaworthy is nondelegable or whether we say instead that the privity or knowledge of the employee to whom the whole or a part of that managerial duty has been delegated is imputable to the shipowner. This Circuit has stated as much (quoting approvingly from Gilmore & Black, The Law of Admiralty [1957], p. 696) as an alternative ground for its holding in States SS Co. v. United States (The Pennsylvania), supra, 259 F.2d at 474:

13/ Even as far back as 1906, the Ninth Circuit in a limitation case made reference to "the analogous provisions of the Harter Act." McGill v. Michigan SS Co., 144 Fed. 788, 796.

"Although the Limitation Act uses a vocabulary different from that of Harter and COGSA, the concept of liability is the same: the shipowner is not chargeable with 'privity or knowledge' or with 'design or neglect' when he has used 'due diligence' to furnish a seaworthy ship; he is so chargeable when he has failed in his duty of 'due diligence' and has sent out a ship unseaworthy in some respect that proximately contributes to the loss."

In Doughty v. Nebel Towing Co., 270 F.Supp. 957, 959 (ED La. 1967), the Court stated (quoting in the main from Gilmore & Black, supra, p. 701):

"Some duties appear to be 'nondelegable,' which is a way of saying that the corporation will be conclusively presumed to have 'privity or knowledge' of the breach, or, more directly, that the corporation will not be entitled to limit its liability in such a case no matter what the state of proof on actual privity or knowledge.' These nondelegable duties are 'all facets of * * * the shipowner's duty to provide a seaworthy ship or at least to use due diligence to send out a seaworthy ship,

one that is 'tight, staunch, strong, and well and sufficiently tackled,' and if, as a result, the ship sinks, there is obviously a breach of the duty to provide a seaworthy ship, and the owner will be denied limitation."

Gilmore & Black in this regard, though with the addition of the following important language:

"The corporate owner, unlike the individual owner, will not be allowed to escape liability for breach of his basic duty by delegating either to a master or to subordinate shore officials."

are also quoted by the 9th Circuit in States SS Co. v. United States (The Pennsylvania), supra, 259 F.2d at 472, (ftn. 2) in support (along with the citation of Spencer Kellogg & Sons v. Hicks [The Linseed King], supra) of the following proposition in the case:

"There is respectable authority which would warrant the holding that where the circumstances are such that the owners or managing agents have a duty to act to see that the vessel is made seaworthy, a neglect or failure to take such action will require denial of limitation. Mere instructions to subordinate employees will not suffice to give the owner the benefit of the limitation act." 259 F.2d at 472.

In In re Jacobson (The Edward), supra, 52 F.2d at 180, a case under 46 U.S.C. 183 before the 1936 Sirovich Amendment to that section (adding, among others subparagraph [e]), the Court stated:

> "In the Grueby Case it is said on page 12: 'The duty of shipowners to their seamen to see that their ship is seaworthy and her equipment in safe condition for use when she starts on a voyage is a personal one, responsibility for which they cannot escape by delegating its performance to another. In this respect it is like the common-law duty of a master to provide his servant a suitable place in which to work. And a seaman injured through failure to perform this duty is entitled to compensation.'
>
> "With this statement of the law I fully agree. It is my opinion that those decisions are illogical which hold that, where an owner delegates the job of furnishing a seaworthy vessel to another, he may have limitation, but that, where he tries to make it seaworthy himself, he may not have." (Emphasis added.)[14/]

14/ Appellant's reliance on Earle & Stoddardt v. Ellerman's Wilson Line, 287 U.S. 420, 77 L.Ed. 403 (1932), a

14/ cont'd.

case involving negligence of the chief engineer in bunkering (a typical concern of the ship's personnel) and wherein the Supreme Court denied application to the Fire Act (46 U.S.C. 182) of the Harter Act principle of non-delegability, is misplaced.

The Fire Act and the fire exception in COGSA (46 U.S.C. 1304[2][b]), enacted in 1936, have the same legislative purpose which has carried over into their judicial interpretation: enabling "the carrier to compete (with England) by offering a carriage rate that paid for carriage only, without loading it for fire liability." A/S Ludwig Mowinckels Rederiv. Accinanto, Ltd. (The Ocean Liberty), 199 F.2d 134, 144, 1952 A.M.C. 1681 (4th Cir. 1952), cert. den. 345 U.S. 992, 97 L.Ed. 1400 (1952), quoting from Consumers Import Co. v. Kabushiki Kaisha Kawasaki Zosenjo (The Venice Maru), 320 U.S. 249, 254-256, 88 L.Ed. 30, 34-35 (1943). This purpose--freeing the owner from bearing the risk of cargo loss and damage due to fire--is not at all involved in 46 U.S.C. 183 with which we are concerned in this appeal. Further, more recent cases, such as The Edmund Fanning, supra, show quite a different approach than that of the Supreme Court in 1932 in Earle & Stoddardt. (Note also the concession by cargo in the latter case "that the negligence of the master, chief engineer or other ship's

D. Privity and Knowledge under the Limitation of Liability Act are Imputable where there are Means Available through which the Shipowner can Exercise Control and it Fails to do so.

Gilmore & Black (and this Court also quotes from these authors in this regard in States SS Co. v. United States [The Pennsylvania], 259 F.2d at 474) are of the opinion that the shipowner's denial of exoneration under COGSA or the Harter Act and of limitation under the Limitation of Liability Act should equally depend on the presence or absence of means of control by the shipowner. The appropriate language of Gilmore & Black referred to (p. 696) is as follows:

> "The principle of the Limitation Act is the same as that found in the Harter Act and the Carriage of Goods by Sea Act: because of the extraordinary hazards of seaborne commerce and because the owner can exercise only a nominal control over his 'servants' once the ship has broken ground for the voyage, the owner should be

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14/ cont'd.

officers does not deprive the owner of the statutory immunity [in the Fire Act]. 287 U.S. at 424-425, 77 L.Ed. at 406.)

entitled to exoneration from liability, or at least to a limitation of liability, for whatever happens after the ship has passed beyond his effective control. Contrariwise, he should be held to liability for all loss resulting from his failure to exercise effective control when he had the chance." (Emphasis is in this Court's per curiam opinion in The Pennsylvania, 259 F.2d at 474.[15/]

This Circuit, after The Pennsylvania, actually held that an owner was privy to a master's negligence (in hiring an incompetent crewmember) on the basis that there were means of exercising control at hand by which the fault could have been prevented. Admiral Towing Co. v. Woolen (The Companion), 290 F.2d 641, 648-649 (9th Cir. 1961). And this was a considerably more difficult case for denial of limitation than ours since the shipowner

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15/ See also the decision of Judge Learned Hand in Great Atlantic & Pacific Tea Co. v. Brasileiro, supra, 159 F.2d at 664: "As in all such cases, the measure of the duty imposed depends upon the cost or difficulty of the precaution, compared with the hazard and the interest at stake."

was an individual rather than a corporation.[16/]

Besides the specific approval of this Circuit, there is other substantial case authority supporting Gilmore & Black's conclusion:

Hockley v. Eastern Transp. Co., supra, 10 F.Supp. at 917-918:

> "As has been pointed out, the main purpose of the limited liability statute is to protect the vessel owner from the faults and contracts of the agents when not under the principal's control. It cannot fairly be said that the loading of this barge under all the circumstances was so far removed from the vessel owner's control and supervision as to warrant the latter's complete divorce from any responsibility

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16/ At ftn. 6, 290 F.2d at 649, this Court, through Judge Stephens, adverted to the fact that ownership was in an individual when it discussed nondelegability of the duty to provide a seaworthy vessel. It was stated that to hold the duty nondelegable in the case of an individual owner would result in limitation seldom being granted. "We here mean neither to reaffirm nor to disparage the principle of nondelegability insofar as corporate owners are concerned, but we choose not to apply it in the present situation."

with regard to the amount of its load. The failure to exercise any supervision under the circumstances constituted more than mere casual neglect in a particular instance, and would appear from the respondent's testimony to have been in accordance with a general settled policy to leave the loading even in the home port entirely to the judgment of the barge captain, uninstructed by the owners. In my opinion something more is required of vessel owners under such circumstances to entitle them to avail themselves of the limited liability statute."

From the Supreme Court:

Spencer Kellogg & Sons v. Hicks (The Linseed King), supra, 285 U.S. at 511, 76 L.Ed. at 912:

"The argument is that as the boat was seaworthy when there was no ice and instructions had been given to a competent master not to run her through ice, the owner did its full duty and cannot be held responsible as having privity or knowledge of a violation by the master of these explicit instructions. Cases such as La Bourgogne (Deslions v. La Compagnie Generale Transatlantique) 210 U.S. 95, 52 L.Ed. 973,

28 S.Ct. 664, which involved the master's failure to obey rules and instructions when on the high seas and disaster attributable to such fault, are cited. But there is a vast difference between the cases relied on and instant one. The launch was used for ferriage over a distance of about a mile and a third. She was known to be unseaworthy and unfit if there was ice in the river. There is no analogy between such a situation and that presented in the cited cases where the emergency must be met by the master alone. In these there is no opportunity of consultation or cooperation or of bringing the proposed action of the master to the owner's knowledge. The latter must rely upon the master's obeying rules and using reasonable judgment. The condition on the morning in question could have been ascertained by Stover, if he had used reasonable diligence, and we think the evidence is adequate to support the finding that the negligence which caused the disaster was with his, and therefore with the owner's, privity or knowledge."17/

17/ See also Cullen Fuel Co. v. Hedger, 290 U.S. 82, 88-89,

This Court, in The Pennsylvania, 259 F.2d at 474, used the above quoted language from The Linseed King in support of the preceding quote (in this brief) from Gilmore & Black, p. 696. See also In re Jacobson (The Edward), supra, 52 F.2d at 181.

The telephone and the mail, which were sufficient

17/ cont'd.

78 L.Ed. 189, 192 (1933):

"The petitioner urges that the denial of limitation in cases like this will sweep away much of the protection afforded to ship owners by the acts of Congress. But this view disregards the nature of the warranty (of seaworthiness). The fitness of the ship at the moment of breaking ground is the matter warranted, and not her suitability under conditions thereafter arising which are beyond the owner's control."

The Ninth Circuit in the individual ownership case of Admiral Towing Co. v. Woolen (The Companion), supra, 290 F.2d at 648, drew a distinction between "instantaneous negligence on the part of the master at sea, (i.e.) negligent behavior over which the shipowner could not possibly exercise control," and "unlimited agency powers (in the master) to take care of all other aspects of keeping and running the vessel."

means of control in Hockley to cause denial of limitation for what the master did, were just as available to Waterman here, since the CHICKASAW spent over a month in Japanese and adjacent ports, beginning and ending her sojourn there in Yokohama.[18/] Further, Waterman could have exerted control through a shoreside representative such as Everett Steamship Company, itself a vessel owner as well as ship's agent acting in various ports of the world (including Yokohama) where offices are maintained. Inspection of the vessel--and especially her navigational equipment--could have been accomplished by Everett or a Waterman shoreside employee. Neither was done and instead the master

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18/ See Gilmore & Black, supra, p. 708:

> "... modern communications by telegraph, cable and radio, make the idea, which was often true in fact a hundred years ago, of credit extended 'to the ship' in foreign ports, without the owner's authorization, fictional indeed. Although the point has never been authoritatively determined in a modern case, it is probable that all repair and supply contracts are 'personal,' home port or foreign port, lien or no lien."

See also Avera v. Florida Towing Corp., 322 F.2d 155, 165 (5th Cir. 1963).

was given full authority in way ports to make the vessel seaworthy and to arrange, if he cared to, for repairs of such necessary and vital equipment as the fathometer and radar. Thus, instead of keeping control in some manner, Waterman delegated this vital part of its management function to the ship's master. His failure to perform it caused privity and knowledge to be imputed to Waterman. True, it also caused denial of exoneration under COGSA but nowhere did the Court below say that because exoneration is denied limitation is also denied. While we submit that the Trial Court could have held that way under the existing authorities, it did not rest on such an assumption but went forward to make the well-substantiated (as we will show) findings of direct fault and privity/knowledge.

E. There is Nothing Inherent in the Position of Master which Permits a Shipowner to Insulate Itself under the Limitation of Liability Act by Delegating Managerial Responsibility to the Master.

Why does Appellant assume that, as a matter of law, the shipowner cannot delegate managerial functions to a master?[19/] (See, for example, Opening Brief p. 22.)

19/ We are unable to follow Appellant's argument that the 1936 Sirovich Amendment to 46 U.S.C. 183, adding

There is nothing about the master's position that limits his duties to navigation and management while at sea. On the contrary, in fact, for he has a great deal of authority to bind the shipowner even without a delegation such as was made in our particular case. His contracts can, for example, create a lien on the vessel and bind the owner. Further, the master's statements constitute admissions of the owner. The Joseph J. Hock, 70 F.2d 259, 260, 1934 A.M.C. 507 (2d Cir. 1934); Abangarez-Submarine 05,

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19/ cont'd.

subsection (e):

"In respect of loss of life or bodily injury the privity or knowledge of the master of a seagoing vessel or of the superintendent or managing agent of the owner thereof, at or prior to the commencement of each voyage, shall be deemed conclusively the privity or knowledge of the owner of such vessel."

shows that, where loss of life or personal injury is not involved, the law is otherwise concerning privity or knowledge. Were this so, limitation would be granted not only where the master was involved but also where the privity or knowledge is that of the superintendent or managing agent. This is not the law. Further, the action of Congress in adding such a subsection and not touching 183(a) could not be construed to have meant to affect the latter.

60 F.2d 543, 544, 1932 A.M.C. 1247 (ED La. 1932); 1 Benedict on Admiralty (6th ed.), pp. 20, 152-153. The master of a vessel is, for discovery purposes, considered to be a "managing agent" of the shipowner under Fed. R. Civ. P. 26(d)(2). Curry v. States Marine Corp., 16 F.R.D. 376 (SDNY 1954); Shenker v. United States, 25 F.R.D. 96 (SDNY 1960); Wilson v. Trinidad Corp., 11 F.R.D. 191 (SDNY 1951).

The Shenker case defined "managing agent" as follows:

> "Without setting forth all the applicable guides it might be stated in short that a person who is vested with general supervisory authority with full power to exercise judgment and discretion in managing and dealing with the principal's interest in the subject matter of the litigation and is loyal to the principal, is a managing agent. Accordingly, it has been held that a captain or chief officer of a vessel satisfies these criteria and is a managing agent whose deposition may be taken within the meaning of the rules." 25 F.R.D. at 98, 99.

See also United States v. The Dorothy McAllister, 24 F.R.D. 316, 318 (SDNY 1959). Such language can properly be related to the Limitation of Liability Act.

Even without imputing privity or knowledge

because of the delegation of managerial responsibiliy, a master's or crewmember's negligence--even at sea--can be the basis for a finding of direct fault of the owner and result in denial of limitation, providing that the master's or crewmember's negligence was foreseeable to the owner. As stated by the First Circuit in Christopher v. Grueby, supra, 40 F.2d at 13:

> "If the engineer was careless in pouring gasoline when the engine or engines were running, nevertheless the owners could reasonably have foreseen that he might do so, and their negligence in suffering this fire hazard to exist in the engine room could be found to be the proximate cause of the disaster, and we think it was. (Citations.) No rules were provided or instructions given to the engineer not to fill the reservoir when the engines were running. Furthermore, as the owners were negligent in failing to provide reasonable means to cope with a fire in the engine room, where one reasonably could be expected to occur, their failure in this respect was plainly a cause of the loss and damage here complained of and for which they are responsible."

F. Limitation of Liability Can Be Denied Due to the Direct Fault of the Shipowner without Consideration of

Privity or Knowledge.

In Mobile, the CHICKASAW's home port, the company maintained a Port Captain and Port Engineer, personnel who are actually 'managing officers of the corporation." States SS Co. v. United States (The Pennsylvania), supra, 259 F.2d at 464. Their failure to inspect the ship and her navigational equipment while she was in Mobile is shown by the long-standing neglect of the CHICKASAW's fathometer and radar. (See further sections II A and B, infra.) These defects are such that "we are forced to the inevitable conclusion that what the company did through these officials was insufficient." In re Eastern Transp. Co., supra, 37 F.2d at 364. This is "such neglect on the part of the managing officials of the company as to preclude the company from availing itself of the defense of limitation of liability, on the ground of lack of privity or knowledge." Id., 37 F.2d at 365.

As the Court of Appeals stated in The Lady Gwendolen, supra, referring to the decision of the trial judge in denying limitation:

> "With the obvious sources of fault lying with the master and the marine superintendent, why has the judgment found actual fault on the owners or at least a failure on their part to

establish no fault?

"It is on account of the introduction of radar and the learned Judge's view of the owner's obligation with regard to supervision of its use. Reliance on a competent master and an efficient marine superintendent has been held by him not to be enough to exonerate the owners." [1965] 1 Lloyd's List L.R. at 338.

"... as the judge finds, no steps were taken by them (the shipowners) to insure that their masters used their radar in a proper manner and he adds that the radar problem was one of such serious import as to merit and require the personal attention of the owners." [1965] 1 Lloyd's List L.R. at 339.

Appellant has failed to attack the finding of its direct fault, or even to refer to it. Appellant cannot therefore go behind that finding.

II

The Findings of Fact and the Evidence Establish All Necessary Elements for a Decision Denying Exoneration from and Limitation of Liability.

Although, as we have pointed out, Appellant has failed to attack as clearly erroneous any of the lower Court's findings of fact, and indeed has carefully avoided any reference to the facts of this case, the very nature of a limitation action requires that the pertinent facts be considered. Whether or not limitation will be allowed cannot be decided as an abstract question of law since privity and knowledge, which Appellant disaffirms, turn "on the facts of particular cases." Coryell v. Phipps (The Seminole), 317 U.S. 406, 411, 87 L.Ed. 363, 368 (1943).

A. The Evidence Supports the Finding of Unseaworthiness and Causality by Reason of the Condition of the Fathometer.

Appellant does not dispute that the CHICKASAW was unseaworthy prior to her stranding in that her fathometer was not in a reliable working condition. (FF 4.) As the evidence more fully shows, however, the fathometer was defective in at least three respects:

(1) The voltage on the "bias control" was abnormally low due to the fact that two resistors in the bias control mechanism had changed value over a period of time. (T. 687, 706-709.) The bias control on a fathometer determines the

strength of a signal which will be conducted by a fathometer tube and, therefore, shown on its indicator. An abnormally low bias control voltage, as was present on the CHICKASAW fathometer, permits smaller signals to be amplified with the result that stray or false signals may be shown around the fathometer indicator. (T. 707, 708.)

(2) The grid caps on two tubes inside the receiver-amplifier of the fathometer were loose to the extent that they were not making contact at all times. This malfunction also causes the fathometer indicator to pick up stray or false echoes as the grid caps intermittently make contact due to the vibration of the ship. (T. 688, 690, 704.)

(3) A pin was apparently sheared in the gear train which causes a dial on the fathometer indicator to register either feet or fathoms. The effect of a sheared pin is to cause slippage in the gears, resulting in an inaccurate presentation of distance on the indicator dial. (T. 688-690.)

It is interesting to note that either of the first two defects mentioned above, the improper bias control voltage or the loose grid caps, can cause precisely the type of malfunction which was reported by Third Officer Jensen, that is, lights or signals all around the fathometer dial rather than on a particular fathom mark. (T. 670, 1410.)

Both fathometer experts, Mr. Harrison and Mr. Haldane, confirmed that the defects in the CHICKASAW's fathometer were sufficient to make it at least unreliable. Both experts also agreed that the fathometer was in dire need of servicing. Mr. Haldane, the Appellant's own expert, stated in his original report:

> "There is no way of determining whether or not this equipment would have worked correctly at any particular time in the past. There was ample evidence that its operation could be highly erratic and unstable for both mechanical and electronic reasons. There was also ample evidence that would lead one to conclude that it had not been serviced for a long time. It was definitely in need of service at the time of this inspection for both mechanical and electronic reasons." (T. 1345.)

Mr. Harrison pointed out that the receiver-amplifier cover of the fathometer was coated with at least three layers of paint which had to be chipped away before it could be inspected. (T. 686, 687.) He further testified that fathometers should be inspected at least annually and that if such inspection had been carried out the defects in the CHICKASAW's fathometer would surely have been discovered. (T. 693.) Moreover, his uncontradicted testimony is that the defects in the CHICKASAW's fathometer had existed for

a considerable period. The grid caps, for instance, would not, in his opinion, have been loosened by vibration in less than a year's time. (T. 705, 706.)

The Appellant likewise does not dispute the Court's finding that:

> "The condition of the fathometer contributed to the stranding. Immediately preceding the stranding of the SS CHICKASAW, Jensen, the third mate, who had previously discovered the fathometer to be inoperative, was mate on watch. As the vessel approached Santa Rosa Island, Jensen was looking through the rain for white water, an indication of breaking waves and the shoreline. If the fathometer had been operative, Jensen would have turned it on during this approach, which would have revealed shallow water in time to avert the stranding. The reason it was not turned on was that, in his judgment, it was inoperative. (FF 4.)

Appellant instead attempts to show lack of causation by arguing that Jensen's deposition should be excluded because he died before there was an opportunity for cross examination. It is believed that Appellant is clearly in error and that the lower Court correctly admitted the deposition. Inasmuch as the authorities concerning this point are fully reviewed in the brief of Appellee Gay Cottons,

Inc., they will not be repeated here. It is pointed out, however, that Jensen's testimony before the Coast Guard additionally supports the Court's finding that the fathometer was not used because of its inoperative condition. (T. 1405-1423.) Moreover, at the Coast Guard hearing Jensen had even more reason than at his deposition to demonstrate that he was not negligent and that he conducted all of his duties in a proper manner. The admission of such testimony, given under oath with full opportunity for cross examination, is in the interests of justice and is fully supported by the authorities. United States v. The J. A. Cobb, 182 F.Supp. 234 (SDNY 1959); Sword Line v. Tug Joseph H. Moran, 57 F.Supp. 183, 1944 A.M.C. 1375 (EDNY 1944).[20] The admissibility of Coast Guard testimony when a witness dies before trial is also in accordance with the general rule allowing the use of test;mony taken in a former proceeding involving the same parties and subject matter when the witness is deceased or otherwise unavailable. Great Northern Ry. Co. v. Ennis,

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20/ The Appellant apparently agrees inasmuch as no objection was made during trial to the admission into evidence of the Coast Guard transcript of Jensen's testimony.

236 Fed. 17, 26 (9th Cir. 1916); Smythe v. Inhabitants of New Providence, 263 Fed. 481, 487 (3d Cir. 1920); Insul-Wool Insulation Corp. v. Home Insulation Corp., 176 F.2d 502, 504 (10th Cir. 1949); Rivera v. Am. Export & Hellenic Lines, 13 F.R.D. 27, 1952 A.M.C. 772, 775 (SDNY 1952).

Even in the absence of any testimony from Jensen, however, the record fully supports the Court's finding that the defective fathometer contributed to the stranding of the CHICKASAW. Captain Patronis, the Master of the CHICKASAW, testified that he received Jensen's report that the fathometer was not working and that he directed Jensen to make a log entry to this effect, which was done. (T. 134, 135.) Captain Patronis stated that it was his customary practice to use the fathometer to determine the position of his vessel (T. 143) and he agreed that the fathometer should have been used in making a landfall. (T. 152.) All expert witnesses also agreed that the fathometer should have been, and under normal circumstances would have been, used by the CHICKASAW prior to her grounding. (Captain Slack T. 518, 519; Captain Solnordal T. 1009; Captain Vincent T. 1024; Captain DeSanty T. 802, 853.) And there can be no doubt that even a casual use of the fathometer would have prevented the stranding. The fathometer on board the CHICKASAW had a range of 200 fathoms, that is, it would indicate the depth

of water whenever such depth was 200 fathoms or less. The record shows that the CHICKASAW came into water of 200 fathoms or less approximately 15 miles seaward of Santa Rosa Island. At the speed the CHICKASAW was traveling, approximately 16 knots, had the fathometer been used it would have given her nearly an hour's warning that she was in shallow water and not on her assumed track line. This is so because if the CHICKASAW had been where she thought she was, the 200 fathom curve would not have been reached until after the time she actually grounded. (T. 140-142.)

Finally, and most importantly, Appellant's argument that Jensen's testimony constitutes the sole basis for finding that the inoperative fathometer contributed to the stranding overlooks the fact that the absence of an efficient fathometer and mechanical deep sea sounding machine (as required by 46 C.F.R. § 96.27-1) constitutes a statutory violation. As detailed in section IIC, infra, such violation is presumed under the Pennsylvania Rule to have been a contributing cause of the stranding and Appellant has the burden of showing that the defective fathometer could not have so contributed. Since Appellant has not contested on appeal the finding that the CHICKASAW had no reliable fathometer or other sounding device (thus in effect admitting a statutory violation), it is submitted that no evidence by Appellees is required to sustain the

related finding that the condition of the fathometer contributed to the stranding.

B. The Evidence also Requires a Finding of Unseaworthiness and Causality by Reason of the Condition of Other Navigational Instruments.

The opinion and findings of the Trial Court base the unseaworthiness of the CHICKASAW solely upon the inoperative condition of her fathometer. However, the fathometer was only one of several navigational instruments on the CHICKASAW which were either malfunctioning or completely inoperative due to the neglect of Waterman. The most important of these instruments for our purposes are the deep sea sounding machine, the radar and the radio direction finder, any one of which, in good operating condition, would have prevented the stranding. It is submitted that the evidence with respect to these instruments provides an additional basis for denial of exoneration and limitation.

1. The Deep Sea Sounding Machine.

At the time of her Coast Guard inspection in October 1961, the CHICKASAW had on board a mechanical deep sea sounding machine which was reported to be in good operating condition. (T. 1306, 1307.) Even in the absence of an operable fathometer, such a deep sea sounding machine would have satisfied the requirements of 46 C.F.R. 96.27-1

and, more importantly, would have enabled the CHICKASAW to detect shallow water on her approach to Santa Rosa Island. While in the Far East, however, the chief mate decided that the sounding machine, still apparently in good operating condition, was of no value, even though the fathometer had previously been reported to be out of order. He therefore ordered the boatswain to dismantle the machine and dispose of it. "I told him to get rid of it, he could have it." The boatswain thereupon sold the sounding machine for scrap in Kobe, Japan. (T. 743-749; FF 9.) The chief mate did not obtain the permission of Waterman Steamship Company to dispose of the sounding machine and further stated that in the way Waterman operated their ships, it was unnecessary for him to ask their permission. (T. 749.) This was never contradicted by any Waterman official.

2. The Radar.

As was found by the lower court (FF 7), the CHICKASAW's radar was totally inoperative at all times after the CHICKASAW arrived at Japan. The inoperative condition of the radar was actually reported to Captain Patronis by the second mate five or six days prior to arriving in Yokohama on December 21, 1961. (T. 216, 217.) In Yokohama, the radar was examined by a representative of the Nippon Radar Service Company, Mr. Iriya. (T. 1099.) It was found that some of the teeth on the pinion gear,

which rotates the radar antenna, were broken. (T. 1103.) The Nippon Radar Service Company did not have this pinion gear in stock and, as a result, no further attempt was made by the Master of the CHICKASAW to have the radar repaired while the vessel was in the Far East and prior to her departing Yokohama on January 26, 1962. (T. 220-224.)

As was found by the lower Court, "It was possible either to have a new gear cut in Japan or have one flown from the United States." (T. 1107, FF 7.) More specifically, the testimony shows that Nippon Radar Service previously had such a pinion gear manufactured in Japan and that, upon normal order, such manufacture took ten days. (T. 1060-1062.) The service manager of Nippon Radar Service Company also agreed that, upon a customer's request, parts could be ordered from the United States. (T. 1063.) Nevertheless, during the more than 30 days while the CHICKASAW was in the Far East, the Master made no attempt to obtain a new pinion gear by either of these methods.

A more thorough examination of the CHICKASAW's radar after the stranding by Mr. Harrison of Neptune Electronics disclosed the cause of the broken gear. Mr. Harrison found that all of the bolts holding the radar antenna to its housing were loose and that one of the bolts was missing. The missing bolt, Mr. Harrison concluded, had loosened and dropped down into the teeth of the gear, causing the damage

which rendered the radar inoperable. (T. 694.) Mr. Harrison explained that such hold-down bolts have a tendency to work loose as a result of normal ship vibration but that this condition could readily have been discovered in a routine periodic inspection. (T. 695-696.)

Although the lower court found that the CHICKASAW's radar was unusable, it determined that this defect was not a contributing cause of the grounding because "the crew all knew that the radar was unusable and were placing no reliance upon it." (FF 8.) It is submitted that this very fact, the inability of the crew to rely upon the inoperative radar, conclusively shows that the defect did contribute to the stranding. Indeed, the very same reasoning used by the Court with respect to the fathometer is applicable to the radar: "If the fathometer had been operative, Jensen would have turned it on during this approach, which would have revealed shallow water in time to avert the stranding. The reason it was not turned on was that, in his judgment, it was inoperative." (FF 4.) If the radar had been turned on, it would have revealed the presence of, and the distance to, Santa Rosa Island itself. There can be no question but that the radar, as compared with other aids to navigation, would have provided the most effective warning of the impending danger.

There is also no doubt that the radar would have been used had it been operative. Although Captain

Patronis was himself inexperienced in the use of radar, Chief Mate Filippone testified that the CHICKASAW customarily used the radar for the purpose of making a landfall in poor visibility. In his own words, "That's the best thing to use." (T. 394.) Indeed, the crew of the CHICKASAW had come to rely upon the radar to such an extent that when the vessel's position could be determined by radar, other navigational instruments, such as the radio direction finder, would not be used for that purpose. (T. 359, 817.)

It is therefore submitted that the evidence conclusively shows that the CHICKASAW's radar was defective and that, contrary to the finding of the lower Court, such defective condition contributed to the stranding. Much has been made by Appellant of the fact that radar (unlike the fathometer and radio direction finder) is not required by statute or regulation. But there is, of course, no requirement that a statute be violated in order to preclude either exoneration under the Carriage of Goods by Sea Act or Limitation of Liability under 46 U.S.C. 183 [21] (although as discussed in section II C, infra, the violation of a statute may place a far heavier burden upon the vessel owner under

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21/ See, for example, Greater New Orleans Expressway Com'n v. Tug Claribel, discussed at Section II C 3, infra.

the Pennsylvania Rule). The effect of the absence of radar on the CHICKASAW must necessarily be considered in light of all relevant circumstances, including the customary reliance of her personnel upon the radar and the complete absence of any other effective navigational equipment on board.

3. The Radio Direction Finder. 47 U.S.C. 351, a portion of the Federal Communication Act of 1934, requires that vessels of the CHICKASAW's gross tonnage be "equipped with an efficient radio direction finding apparatus (radio compass) properly adjusted in operating condition ..." It was further required by 47 C.F.R. 8.517b that the calibration of such radio direction finder shall be checked at yearly intervals or as near thereto as possible and that a record of such check shall be maintained on board for at least a year.[22/] The CHICKASAW had on board a radio direction finder (hereinafter referred to as "RDF"). However, as was found by the Court (FF 8), there is no evidence that the required accuracy check of the RDF had been conducted on board the CHICKASAW subsequent to 1957, five years prior to the stranding.

The evidence shows that the proper way to calibrate an RDF is to "swing the ship," that is, to compare bearings obtained by the radio direction finder with visual

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22/ This requirement is now set forth in 47 C.F.R. 83.459b.

bearings in all four quadrants of the compass. Chief Mate Filippone testified that such a check of the RDF had never been carried out after his arrival on the CHICKASAW in April, 1958. Only once, in October, 1958, did he recall any comparison being made between RDF and visual bearings. (T. 340-342.)

Not only was there no more recent correction table posted than the one dated 1957, but even this table was of no practical value to the vessel or her personnel. Captain Patronis testified that he had no idea what use should be made of this table inasmuch as he did not know whether or not the errors listed on the table had already been compensated for in the permanent calibration of the RDF. (T. 242-245.) Chief Mate Filippone also stated that he had never been told anything about this table. (T. 348-350.) Such is not surprising in view of the testimony of Captain Murdock, Waterman Steamship Corporation's Port Captain, that Waterman maintains no program for insuring that a proper correction table is kept on board their vessels and indeed makes no inspection to insure that shipboard personnel comply with the statutes by conducting annual accuracy checks and maintaining such a table. (T. 1378.) (See further section II E 2, infra, dealing with Waterman's failure to inspect.)

As found by the lower court (FF 8.), the

position fixes obtained from the RDF prior to the stranding of the CHICKASAW were completely inconsistent and as a result were of no practical assistance to the CHICKASAW. The most accurate position fix obtained was at 1640 hours, which fix was nearly four miles in error. At least five additional attempts were made to obtain fixes subsequent to the stranding of the CHICKASAW at 2117 hours, but all of these fixes placed the CHICKASAW considerably to the south of her correct position. (T. 121.) The lower Court concluded, however, that the RDF fixes did not contribute to the strand, apparently because they were so far in error: "...no reasonably expected deviational error could account for the wildly divergent and inconsistent fixes which the crew obtained. If the incorrect fixes obtained from the radio direction finder contributed to the grounding, these fixes were due to the negligence by members of the crew and are not due to any failure to have an up-to-date deviation card aboard." (FF 8.) If the RDF fixes had been only slightly in error, the Court apparently would have found no difficulty in concluding that the defects in the RDF contributed to the stranding. While it is not contested that the crew may have been negligent in using the RDF, such negligence in no way supersedes the defects in the equipment. Indeed, a negligent or less competent crew has even greater need for equipment in proper working order and if negligence

and faulty equipment were concurrent causes of the error, Waterman may not be heard to rely upon the negligence to relieve them of their responsibility for proper maintenance.

Finally, it is again noted that the failure to annually check the calibration of the RDF and to have on board an up-to-date correction table constitute statutory violations. Thus, as with the fathometer, Appellant has the burden under the Pennsylvania Rule of showing that such violations could not have contributed to the stranding. (See section II C, infra.) Merely showing the negligent use of such equipment does not begin to meet this burden.

C. Appellant has Failed to Meet the Burden of the Pennsylvania Rule.

The Government contends that the CHICKASAW was in violation of two regulatory safety measures prior to and at the time of her stranding:

(1) Failure to have on board either an operative fathometer or mechanical deep sea sounding device as required by 46 C.F.R. 96.27-1.

(2) Failure to have on board an "efficient" radio direction finder "properly adjusted in operating condition," 47 U.S.C. 351, and 47 C.F.R. 8.516, as shown by her failure to carry out and maintain on board the annual accuracy checks as required by 47 C.F.R. 8.517(b).

The effect of these statutory violations is to require Appellant to meet the burden of the admiralty presumption known as the Pennsylvania Rule. Because of the importance of the presumption to this case, it will be dealt with at some length.

1. The Pennsylvania Case.

The presumption known as the Pennsylvania Rule derives its name from The Pennsylvania v. Troop, 86 U.S. (19 Wall.) 125, 22 L.Ed. 148 (1873). An understanding of the nature of the presumption and the reasons for its adoption necessitates a review of the facts pertinent to the Court's decision.

The case arose out of a collision in the fog between the British steamship Pennsylvania and a British bark, Mary R. Troop. Immediately before collision, the steamer was proceeding at about seven knots, although the fog was so thick that visibility was probably less than a ship's length. The bark, on the other hand, was moving very slowly, probably less than one knot, and was ringing a bell constantly. A collision occurred and the bark sank. A libel was filed by the owners of the bark and judgment was rendered in their favor by the District Court. The Circuit Court affirmed and an appeal was taken to the United States Supreme Court. The steamer was held clearly at fault, mainly for her immoderate speed in the dense fog. The main issue on

appeal, therefore, concerned the liability of the bark, for she was in violation of regulations providing that sailing vessels shall use a fog horn when under way and, when not under way, shall use a bell. The Court emphasized that although the bark was moving at a very slow speed, she was constantly changing position and therefore clearly required to blow a fog horn. The claim of the bark was that this violation "was only a technical fault, not a substantial fault, and did not in any way contribute to the collision."

A statutory fault having been established, it thus remained for the Court to determine whether or not such fault contributed to the collision and it was on this issue that the Court set forth the presumption for which the case has become famous:

> "Concluding, then, as we must, that the bark was in fault, it still remains to inquire whether the fault contributed to the collision, whether in any degree it was the cause of the vessels coming into a dangerous position. It must be conceded that if it clearly appears the fault could have had nothing to do with the disaster, it may be dismissed from consideration. The liability for damages is upon the ship or ships whose fault caused the injury. But when, as in this case, a ship at the time of collision is in actual

violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute." (Emphasis added.) 86 U.S. at 136.

The Court thus stated, and the case has been cited for the proposition time and time again, that a statutory violation is presumed to have been "if not the sole cause, ... at least a contributory cause of the disaster." And the Supreme Court further emphasized that the offender has the burden of proving that the violation could not have been one of the contributing causes.

2. Application of the Pennsylvania Rule - Generally.

The Pennsylvania Rule has been applied in literally thousands of cases since it was first enunciated by the Supreme Court, and the reason for its application, i.e., to enforce compliance with regulations promulgated for the safety of life at sea, is as valid today as when the rule was adopted. Just one example of a recent expression of the rule is found in Reiss Steamship Co. v. Compagnia Flepera Cajotamil, S.A., 374 F.2d 117, 123 (6th Cir. 1967):

"It is understandable that courts desire to mitigate the 'Pennsylvania' burden, and the rigors of the divided damages rule. However, this Court has strictly applied the rules of navigation, and has placed a heavy burden upon a vessel to show not merely that her faults might not have been causes, but that such faults could not have contributed to the collision.

"We believe the West violated Rule 26 when she failed to sound a danger signal, and that she failed in her burden of showing that this failure could not have contributed to her grounding."

Although The Pennsylvania was a collision case, he presumption has consistently been applied in all types of dmiralty cases, including such diverse statutory violations s:

(a) violation by a bridge of regulations[23/] pertaining to its construction or operation. The Fort Fetterman v. South Carolina State Highway Dept., 278 F.2d 921 (4th Cir. 1960); Great Lakes Towing Co. v. Mesaba S.S. Co., 237 Fed. 227 (6th Cir.

23/ It has been settled law ever since Belden v. Chase, 150 U.S. 674, 698, 37 L.Ed. 1218, 1227 (1893), that a violation of regulations promulgated pursuant to statutory authority will invoke the Pennsylvania Rule.

1916); Conners Marine Co. v. New York & Longbranch R. Co., 87 F.Supp. 132 (D.N.J. 1949); Buffalo Bridge Cases (Petition of Kinsman Transit Co.), 338 F.2d 708, 718 (2d Cir. 1964);

(b) violation of regulations by an underwater construction project, Bultema Dock and Dredge Co. v. Steamship David P. Thompson, 252 F.Supp. 881 (W.D. Mich. 1966);

(c) improper construction of an underwater pipeline in violation of the Rivers and Harbors Act, 33 U.S.C. 403, Atlantic Pipe Line Co. v. Dredge Philadelphia, 247 F.Supp. 857, 862 (E.D. Pa. 1965), affirmed 366 F.2d 780 (3d Cir. 1966);

(d) failure of a barge to give Coast Guard the required notice of material damage and to have a licensed tanker man assigned to supervise unloading of gasoline as required by Coast Guard regulations, Commercial Transport Corporation v. Martin Oil Service, Inc., 374 F.2d 813 (7th Cir. 1967).

The Pennsylvania Rule has been applied in actions arising out of the stranding of vessels ever since Richelieu and Ontario Navigation Co. v. Boston Marine Insurance Co., 136 U.S. 408, 34 L.Ed. 398 (1890). See also Flint & P.M.R. Co. v. Marine Insurance Co., 71 F.2d 210 (E.D. Mich. 1895); American Merchant Marine Insurance Co. of New York v. Liberty

Sand and Gravel Co., 282 Fed. 563 (3d Cir. 1922); and the general discussion of the application of the Pennsylvania Rule to stranding cases in The Denali, 112 F.2d 952, 955 (9th Cir. 1940).

3. Application of the Pennsylvania Rule in Limitation of Liability Cases.

One of the most common applications of the Pennsylvania Rule is in actions seeking limitation of liability. The reason for its application in such cases was well stated in The E. Madison Hall, 140 F.2d 589 (4th Cir. 1944), cert. denied 322 U.S. 748, 88 L.Ed. 1579 (1944), wherein the vessel was not provided with the proper complement as required by statute. In holding that the District Court properly denied the petition for limitation of liability, the Circuit Court stated:

> "The burden of proof, however, to establish lack of privity or knowledge rests upon the owner seeking limitation of liability. And where the owner has privity or knowledge of some violation of the statutes affecting the navigation of the ship, it is presumed under the doctrine of The Pennsylvania, 19 Wall. 125, 136, 22 L.Ed. 148, that the fault is at least a contributing cause to the loss; and the owner must bear the burden of showing not merely that his fault probably was not, but also that it could not

have been a contributing cause of the disaster. The New York Marine No. 10, 2 Cir., 109 F.2d 564, 566; The Denali, 9 Cir., 105 F.2d 413, 420. This burden has not been borne by the owner in the pending case and the decree of the District Court must therefore be affirmed." 140 F.2d at 591.

Similarly, in Martin Marine Transportation Co. v. United States, 183 F.2d 676 (4th Cir. 1950), a petition for limitation of liability was denied because of undermanning in violation of regulations. In reversing the District Court, which granted limitation as to the barges involved, the Fourth Circuit held:

"In exonerating the barges Contoy and Southern Sword, the District Judge seems to have applied the rule that this undermanning of the two barges must be shown to have actually contributed to the sinking of the Lightship. This is not the correct rule. Upon such a violation of the statutory regulations, the burden is placed upon the barges to show that this violation could not have contributed to the collision, and not whether it did so contribute. We do not think the barges met this heavy burden." (Emphasis supplied by Court.) 183 F.2d at 680.

See also The New York Marine No. 10, 109 F.2d 564 (2d Cir. 1940); In re Pacific Mail S.S. Co., 130 Fed. 76 (9th Cir. 1904); Howe v. Brooks, 329 F.2d 35 (4th Cir. 1934).

The fact that negligence of ship's personnel may have contributed to the casualty in no way affects the application of the Pennsylvania Rule to a shipowner's attempt to limit liability. As was stated in The Eagle Wing, 135 Fed. 826, 832 (ED Va. 1905):

> "The faults on the part of The Eagle Wing consist not only in error and negligence on the part of her navigators in the management and control of the vessel, but there was an initial fault, serious in its character, in that an important statutory requirement was violated in the selection of the vessel's mate. ... the failure to comply with statutory requirements and regulations has frequently received the severest condemnation of the courts, and, when such an omission is clearly established, the presumption is that it did contribute to the collision, unless the contrary is obviously apparent, and this presumption attends every fault connected with the occurrence; and an obligation is imposed to show not only that it probably did not so contribute, but that it could not have done so. Pennsylvania v. Troop, 19 Wall. 125, 22 L.Ed. 148; Martello v. Willey, 153 U.S. 64; The Bernicia (D.C.), 122 Fed. 886; The Alabama (4th Cir.), 126 Fed. 332, 61 C.C.A. 238."

Although most of the cases cited above deal with manning violations, there is no doubt that the Pennsylvania Rule is applied with equal vigor in cases of violations involving required shipboard equipment. The Martello v. Willey, 153 U.S. 64, 38 L.Ed. 637 (1894); The Bolivia, 43 Fed. 173 (EDNY 1890), reversed on other grounds, 49 Fed. 169 (2d Cir. 1891).[24/] The rationale to be applied to statutory equipment requirements is well illustrated by the following two cases. If a vessel takes proper precautions to have on board a good fog horn and the fog horn becomes out of order at sea through no fault of the vessel, the Pennsylvania Rule will not apply. The Trave, 55 Fed. 117 (SDNY 1893), affirmed 68 Fed. 390 (2d Cir. 1895), cert. denied 163 U.S. 692 (1895). However, if it appears that the fog horn was not properly tested before the voyage to make certain that it was fit for use, the Pennsylvania Rule applies and the vessel will be held. The Niagara, 84 Fed. 902 (2d Cir. 1898). It is

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24/ This Court in The Denali, 112 F.2d 952 at 955, (9th Cir. 1940), pointed out the pronouncement of the Supreme Court in The Martello v. Willey that:

> "This is a presumption which attends every fault connected with the management of a vessel, and every omission to comply with a statutory requirement or with any regulation deemed essential to good seamanship." 153 U.S. 64 at 74.

precisely this reasoning which must bar the CHICKASAW from limitation.

The recent case of Greater New Orleans Expressway Com'n v. Tug Claribel, 222 F.Supp. 521 (ED La. 1963), affirmed sub nom. Coleman v. Jahncke Service, Inc., 341 F.2d 956 (5th Cir. 1965), shows that the failure of a shipowner to properly equip a vessel will compel denial of limitation even when such failure does not amount to a statutory violation. The District Court denied the petition for limitation of liability because the tug's compass had not been checked or calibrated since its installation and because neither the captain nor the pilot of the tug knew how to make proper use of the compass or to compensate for its deviation:

> "The tug owner has a duty ... to send the vessel out prepared to meet conditions which are likely to befall the vessel. It is the owner's duty to see to it that a vessel's equipment is in safe working order. In re Jacobson, D.C. Tex., 1931, 52 F.2d 179. We hold that it failed to do so." 222 F.Supp. at 525.

Unlike the fathometer or radio direction finder, there is no statute or regulation requiring that a ship be equipped with a compass. The Fifth Circuit nevertheless affirmed the decision of the lower court, stating:

> "The evidence generously supports the District Court's finding that shortcomings of crew and

compass were a proximate cause of the accident, though not the sole proximate cause." 341 F.2d at 959.

4. The Denali.

Perhaps the foremost authority applying the Pennsylvania Rule in limitation of liability actions is the opinion of this Court in The Denali, 23 F.Supp. 145 (W.D. Wash. 1938), reversed 105 F.2d 413 (9th Cir. 1939), former opinion adhered to on rehearing 112 F.2d 952 (9th Cir. 1940), cert. denied 311 U.S. 687 (1940).

The DENALI stranded in British Columbia waters while on a voyage from Seattle to Alaska. The shipowner filed for exoneration from or limitation of liability. Cargo claimants contested limitation, claiming unseaworthiness in the vessel's compasses, charts, and division of watches by the ship's officers, the latter point becoming the focal point of the case. 46 U.S.C. 223 requires that a vessel "shall have in her service and on board three licensed mates, who shall stand in three watches while such vessel is being navigated." The DENALI utilized two of its three mates to stand watches and an especially employed pilot in place of the chief mate as a watch officer. At the time of the strand, the pilot was on watch and was being assisted by the third mate. There was a complete absence of any evidence tending to show that either one was affected by fatigue or had stood an

unduly long watch prior to the casualty. The District Court declined to find a statutory violation under these circumstances and held that the DENALI was seaworthy with respect to the manning of the vessel. That Court found that the stranding was caused by strong currents in the area which set the vessel into the reef. As such, the casualty was held to be the result of an error in navigation, and the owner was entitled to exoneration.

On appeal, this Court reversed and held that there was a statutory violation. The purpose of the statute was found to be to insure that each of the three mates stand two four-hour watches per day. In fact, it was found that the mates were standing a longer period of watch than four hours on the DENALI and the pilot was alternating six-hour watches with the master. Because of these long hours and the use of the pilot, the owner was found to be operating the vessel in violation of the three watch provision of the statute and the Court applied the Pennsylvania Rule. Limitation was denied and cargo owners were held entitled to recover their damages. As stated by Judge Denman, quoting from the Court's previous decision in The Princess Sophia, 61 F.2d 339, 347 (9th Cir. 1932):

> "The rule simply is that the violator is penalized with the burden of showing that the violation not only probably did not cause the accident, but that it could not have done so. This burden it is

frequently extremely difficult, if not impossible, for the violator to discharge, in the nature of things; and herein lies the true penalty imposed upon him." (Emphasis supplied by the Court.) 105 F.2d at 418.

Thus, although there was no showing that the owner had devised the watch scheme found to be in violation of statute (in fact the owner had provided the three mates plus the pilot and the master) and although there was no showing that a pilot and mate are less able to properly navigate a ship than is a mate alone, the statutory violation was held sufficient to preclude limitation of liability. The holding of this Court in The Denali shows that in the Ninth Circuit, probably more so than elsewhere, a shipowner is held to strict accountability for a breach of safety legislation and must bear a heavy burden of exculpation. The forthright holding in The Denali can only be read as requiring the application of the Pennsylvania Rule in the instant case.

5. The Pennsylvania Rule - Conclusion.

The Appellant has not contested the lower Court's finding that the CHICKASAW was not provided by its owners with a proper fathometer or other deep-sea sounding device. No more is needed to show a violation of 46 C.F.R. 96.27-1, requiring that each vessel "shall be fitted with an efficient mechanical or electronic deep-sea sounding apparatus." Indeed,

in view of the complete lack of inspection and maintenance of the fathometer (as conceded by Appellant's own expert) and the scrapping in Japan of the mechanical deep-sea sounding machine, a violation of the regulation can hardly be contested.[25/] The record of neglect of the fathometer, extending as it does over many years of time and three coats of paint, effectively precludes Waterman from claiming that it had no privity and knowledge with respect to such deficiency. And, as is pointed out in section II E 3, infra., certification by the Coast Guard cannot be used to shift the shipowner's responsibilities. Causation between the defective fathometer and the stranding is therefore provided by the Pennsylvania Rule, and it is unnecessary that the Appellees prove, by Jensen's testimony or otherwise, that such deficiency contributed to the stranding.

The Government also contends that the decision of the lower court must be affirmed because of Waterman's statutory violations with respect to the radio direction finder. As with the fathometer, Waterman's neglect of the radio direction finder extends over a period of many years and the

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25/ A preponderance of the evidence has been held sufficient to prove a statutory violation, thereby invoking the Pennsylvania Rule. Wood v. United States, 125 F.Supp. 42, 48 (SDNY 1954); Palmer v. Merchants' & Miners' Transp. Co., 154 Fed. 683 (D. Mass. 1907); The Duquesne, 262 Fed. 1 (3d Cir. 1920).

fact that the RDF had not been properly corrected by annual comparison of RDF bearings with visual bearings is uncontradicted. The statutory violation is apparent and privity and knowledge of such violation is obvious from the testimony.

The regulations requiring a vessel to be equipped with an "efficient" fathometer and an "efficient" radio direction finder are clearly the very type of safety regulations contemplated under the Pennsylvania Rule. Compliance with either of these statutory requirements would have enabled the CHICKASAW to determine her position and thus avoid steaming into Santa Rosa Island at 16 knots. The Appellant's burden of proving that the absence of such equipment could not have contributed to the casualty is insurmountable. As stated by the Supreme Court, in The Pennsylvania, "Such a rule is necessary to enforce obedience to the mandate of the statute." If the Rule serves that purpose here, and thus helps to prevent future casualties, the function of the Rule will have been well served.

D. The Evidence Supports the Finding of Privity, Knowledge and Fault by Reason of Waterman's Delegation of Authority to the Master.

The lower court found (1) that Waterman Steamship Corporation failed to exercise due diligence to make the CHICKASAW seaworthy, and (2) that the unseaworthiness of the CHICKASAW existed with the privity and knowledge, and actual fault, of Waterman.

Finding of Fact 6, dealing with Waterman's privity, fault and knowledge, is divided into two paragraphs. The first paragraph finds in part:

"As to repairs, Waterman placed all authority, including authority to decide whether repairs should be made at all, with the master, and had in the Far East no supervisory or managerial personnel to carry out its obligation to exercise due diligence to make the vessel seaworthy. Waterman therefore had delegated to the master its entire managerial responsibility as respects such repairs at the commencement of this voyage and therefore Waterman had knowledge, privity and is at fault for the decision not to repair the fathometer."

The Appellant does not contest the Court's finding that all authority concerning repairs had been delegated to the master, and, indeed, there is no evidence to the contrary. Perhaps the clearest testimony in this regard comes from Captain Frank Murdock, Waterman Steamship Corporation's Port Captain at Mobile:

"Q Captain, are you primarily responsible for the maintenance and repair of the deck equipment on Waterman ships?

"A Of the deck department?

"Q Yes, in the deck department.

"A May I clarify that?

"Q Surely.

"A In our steamship company all repairs, when you say repairs, are -- the repairs are requested by the master of the chief mate of the deck department and the steward's department and they are turned over to the chief engineer, who in turn turns them over to the port engineer. I am not charged with the repairs of the vessel.

"Q Let me see if I understand this correctly, Captain, then. Is it your testimony that repairs to the equipment in the deck department are initiated only at the request of the master?

"A Only at the request of the master unless I find something wrong, in which case I request it myself.

"Q I will ask you a question or two about your finding something wrong in a minute. For the moment I want to lay that aside and inquire as to whether if you have not found anything wrong, then the only basis upon which a repair is made to any equipment in the deck department would be on the request of the master. Is that right?

"A On the request of the master or the recommendation of the Coast Guard or on the recommendation of the FCC or any of the regulatory bodies.

"Q Apart from the recommendation of these people does the company have any program of its own, through you or through any other of their people here in Mobile, for finding out whether there is any equipment in the deck department that needs repairing?

"A We have no program beyond the setup as I told you on the repairs. The repair requisition comes in and it is handled as I told you."
(T. 1371, 1372.)

The testimony of Captain Anthony, Waterman's vice president in charge of operations, is to the same effect. (T. 1177.)

Based on this testimony, there can be no doubt that the Trial Court was correct in finding that Waterman did place "all authority, including authority to decide whether repairs should be made at all, with the master" and that "Waterman had therefore delegated to the master its entire managerial responsibility as respects such repairs at the commencement of this voyage." As previously discussed in section I, such a total delegation of authority to the master, under circumstances in which Waterman had the opportunity to

exercise control but declined to do so, supports--indeed compels--the Court's finding of privity, knowledge and fault.

E. The Evidence Supports the Finding of Direct Fault on the Part of Waterman.

Whereas the first paragraph of Finding of Fact 6 finds lack of due diligence and privity and knowledge in Waterman by reason of its delegation of authority to the master, the second paragraph of this finding does not deal with delegation of authority but places the privity, knowledge and fault directly upon Waterman Steamship Corporation:

> "Due diligence was not exercised to make the SS CHICKASAW seaworthy and that the loss of the vessel, the absence of due diligence, the unseaworthiness of the fathometer occurred with the privity, fault and knowledge of the Waterman Steamship Corporation."

The record fully supports the lower Court's finding (again not contested by Appellant) that the practices and procedures, or lack of same, employed by Waterman Steamship Corporation are sufficient to charge it, not only with privity and knowledge, but with direct fault in connection with the unseaworthiness and subsequent stranding of the CHICKASAW. As is noted in section I F, supra, if direct contributing fault is shown on the part of a shipowner,

limitation will be denied with no need for a consideration of privity and knowledge.

The testimony with respect to Waterman's direct fault can be conveniently divided into the following major categories:

(1) The failure of Waterman to instruct ship's personnel concerning proper maintenance and repair of navigational equipment;

(2) The failure of Waterman to make proper inspection to determine that navigational equipment was properly maintained and repaired;

(3) Waterman's improper reliance upon the Coast Guard, Federal Communications Commission, and other entities to justify its lack of maintenance and inspection.

Although practically the entire transcript is replete with evidence demonstrating each of these deficiencies, we will undertake to review some of the more graphic testimony in each category.

1. Waterman's Failure to Instruct.

While the lack of instruction by Waterman is apparent from the testimony of every crew member of the

CHICKASAW, as well as Waterman's shoreside personnel, the following testimony of Captain Patronis is typical:

"Q When you told him you would accept the CHICKASAW did Captain Murdock tell you anything about her?

"A He told me she was a good ship.

"Q Did he tell you anything more specific than that?

"A No.

"Q At the time that he called you up and asked you if you wanted to take the CHICKASAW did he tell you anything about her?

"A Not that I recall.

"Q Now, did you have any further conversations or discussions of any kind with Captain Murdock from that time until the time that you first came aboard the CHICKASAW as master?

"A Concerning the ship?

"Q Concerning the ship.

"A No.

"Q Before you actually came aboard as master, did you have any discussions concerning the ship with anyone else from Waterman Steamship Corporation?

"A No." (T. 162, 163.)

* * * * *

"Q Prior to the time you took the CHICKASAW out of Mobile, did you have any discussion with any Waterman personnel concerning what should be done with regard to the maintenance of the ship or her navigation equipment?

"A No.

"Q Did you have any discussion with any Waterman personnel as to the circumstances under which you were supposed to use radar?

"A No.

"Q Did you have any instructions from any Waterman personnel as to what you were to do if you found that the radar broke down and you were in a foreign port and couldn't get it repaired there?

"A No.

"Q Did you have any instructions from any Waterman personnel as to what to do if the radar broke down and you could not obtain parts for her in her next port of call?

"A No." (T. 165, 166.)

* * * * *

"Q Prior to that time [i.e., when the radar was found to be in need of repair] had you ever had any instructions from the owners about what to do if

the radar went out?

"A No.

"Q Did you have any instructions from them as to whether radar parts which were not on board might be flown in from the United States to be installed in another port?

"A No.

"Q They never told you anything about it?

"A No." (T. 223.)

The testimony of the other officers is to the same effect. Chief Mate Filipponi stated that there was no officer aboard the CHICKASAW who had particular responsibility for the navigation equipment (T. 298); that he had never received any instructions or orders of any kind with respect to his duties aboard the CHICKASAW (T. 383, 384); that he had never received any instructions or orders concerning the procedures to be used in maintaining any of the equipment aboard the CHICKASAW (T. 387, 388); and that he, in fact, had no idea what spare parts were available on board the CHICKASAW for any of its equipment (T. 389, 390).

It is also clear that Everett Steamship Corporation, Waterman's General Agent in the Far East, received no more instruction than did Waterman's shipboard personnel. Mr. Nelson, Everett Steamship Corporation's operations manager and branch manager in Yokohama, stated

hat Everett had never received any instructions from Water-
an concerning procedures to be followed with respect to
noperative navigational equipment aboard Waterman ships.
T. 1116, 1117.)

What instructions, then, did Waterman issue
ith respect to navigational equipment? There was on board
book of general instructions (Joint Exhibit 51) which was,
owever, so outdated that no mention was made of any of the
odern navigational instruments upon which vessels commonly
ely, including the radar, fathometer, and radio direction
inder. Waterman did not see fit to replace or supplement
his totally inadequate manual. (T. 268; 269; 1218-1222;
390.) The only current instructions Waterman deemed it
ecessary to issue are found in Joint Exhibit 29, which, in
ffect, directed masters of Waterman vessels not to accomplish
epairs in foreign ports. While repairs to the radar,
adio and gyrocompass were permitted by this Order, no
epairs to the fathometer, RDF or other equipment were to
e accomplished except in a "real emergency."

2. Waterman's Failure to Inspect.

Waterman's delegation to the master of all
uthority to repair and maintain navigational equipment, coupled
ith Waterman's failure to instruct or establish proper
rocedures for such maintenance and repair, would appear
ess culpable had Waterman at least inspected such equipment

periodically. The failure to conduct proper inspections has been held sufficient in itself for denying limitation.[26/]

The need for competent, periodic inspection is all the more obvious considering the plight of the CHICKASAW as she blindly approached Santa Rosa Island. The inoperative condition of the fathometer, radio direction finder and radar are all directly traceable to Waterman's neglect. As has been previously noted, an annual inspection would have disclosed

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26/ "Petitioner had no system or regulation for regular inspection or drydocking, although it owned and operated about thirty vessels. No routine inspection had ever been made of the Trenton. Thus it closed its eyes to what would have been obvious and readily revealed upon a proper and periodic inspection. The record compels the conclusion that the supervision of the vessel was casual and was performed in an indifferent and perfunctory manner. The corporation is chargeable with knowledge of what its managing officers or supervisory employees might have known, and were bound to know, had they made a proper inspection." In re Petition of Henry Du Bois' Sons Co., 189 F.Supp. 400, 403 (SDNY 1960). See also Sanbern v. Wright & Cobb Lighterage Co. (The Hoffmans), 171 Fed. 449, 455 (SDNY 1909); Avera v. Florida Towing Corp., 322 F.2d 155, 166 (5th Cir. 1963); Austerberry v. United States, 169 F.2d 583, 593 (6th Cir. 1948).

the defects in the fathometer. (T. 693.) Both Captain DeSanty, the Los Angeles Port Warden, and Captain Kuhne, claimant's expert, agreed that a proper inspection by the shipowner would also have uncovered the absence of a current RDF correction table. (T. 796-799; 1076-1078.) The defective radar tells the same story. No evidence contradicts Mr. Harrison's testimony that the deficiencies which rendered the radar inoperative would have been discovered in a routine inspection. (T. 696.)

There is, of course, no doubt that none of the navigational equipment on board the CHICKASAW had been inspected or serviced within recent memory. Chief Mate Filippone stated that the fathometer had not been repaired, inspected or serviced during the time he had served on board, i.e., since April 1958. (T. 390.) The last record of any work on the fathometer was five years prior to the stranding. The same lack of care was obvious in the radio direction finder. (T. 353, 354.) Former Chief Mate English also agreed that although his duties on board the CHICKASAW included maintaining the deck gear of that vessel, they did not include the maintenance of any navigational gear. (T. 740.)

The absence of any effective inspection by Waterman is also apparent from the testimony of Captain Anthony, Waterman's vice president in charge of operations, and the testimony of Captain Murdock, Waterman's Port Captain in Mobile. Captain Murdock's testimony concerning his "shipboard inspections" is enlightening:

"Q Is there a routine you have established in connection with these shipboard calls?

"A Yes, among my other duties as port captain, the maintenance of the vessels on the topside is part of mine, and I have a routine established that I proceed -- well, on going aboard the ship I will go to the chief engineer, talk to him, go to the captain and talk to him, and then I start from the flying bridge, actually, and I come down and inspect the flying bridge, come down to the bridge into the chart room, wheelhouse, down to the passenger quarters, the crew's quarters, out onto the main deck, forward, all around, into the storerooms, back aft, see about the mooring lines, check the rust conditions, cargo gear, steam smothering apparatus.

"Q I didn't hear you say, Captain, and I just didn't get the entire answer -- did you indicate whether you visited the bridge area?

"A I do visit the bridge area. I go through the chart room and I go through the wheelhouse with the dual purpose in mind, I look to see the paint conditions, whether it is kept clean, whether it is orderly, whether it is good housekeeping.

"Q Do you ever check any of the equipment or occasionally check any of the equipment up in this area?

"A I occasionally check navigational equipment. Ordinarily -- it is not a routine thing that I check navigation equipment, but I occasionally do check it. (T. 1359, 1360.)

Captain Anthony, who made an inspection of the CHICKASAW in the Fall of 1961, was even less specific concerning any inspection of the bridge area:

"Q In your testimony yesterday you spoke of inspecting the chart room and the bridge, among other parts of the ship.

"A That is right.

"Q Did you make any inspection of the chart room and the bridge while the ship was in port this time?

"A I don't specifically remember making any inspection of the chart room and the bridge. I could have, but I don't specifically remember it." (T. 1197.)

Both Captain Anthony (T. 1224) and Captain Murdock (T. 1378) admitted that Waterman made no inspection or inquiry to determine whether a current RDF correction table had been obtained. As stated by Captain Murdock:

"Q Did you have any program for seeing to it that a table of corrections was kept on board from the one inspection to the next?

"A We don't have a program for that.

"Q And I take it neither you nor anyone else regularly makes any inspections on shipboard to see if there is such a table?

"A No." (T. 1378.)

Waterman's Port Engineer, Mr. Weekley, confirmed that no reports are required on the condition of shipboard navigational equipment and that Waterman's engineering department has no established procedure for inspection of such equipment. (T. 1259-1267.) His testimony in this regard concludes as follows:

"Q Just to sum the thing up, you don't do anything with respect to the radio direction finder or the radar or the gyro unless requested by someone in the deck department of the ship?

"A That is all.

"Q And so far as the fathometer goes, you have described everything that you do?

"A Yes, sir.

"Q Then again, to sum up a little further, while you have here in Mobile fairly complete records to tell whether the engines are operating satisfactorily, you have no records here which would

advise you as to whether the fathometer or the gyro or the radar is operating satisfactorily. Is that a correct summary?

"A Well, we leave the records to the deck department, and on the repairs, for instance, that would be a specialized repair and we are not familiar with the operation.

"Q I am not criticizing you in any way, but I just want to get the record straight in this particular respect. That is correct, is it not?

"A Yes, sir." (T. 1266, 1267.)

Captain Anthony also pointed out that Waterman does ot review the deck department logs to determine the condition f navigational equipment:

"Q There was some testimony that in the engineering department there is a practice for the engineering department to receive the logs and to check them to see what they indicate as to the mechanical condition of various units of equipment on the vessel. Is there any comparable practice so far as the deck department is concerned?

"A No, we don't read the logs unless there is some specific information we want to seek in the log." (T. 1383.)

If Waterman's inspection in her home port was

deficient, any inspection or supervision while the CHICKASAW was in the Far East can only be called nonexistent. Captain Anthony, Waterman's vice president in charge of operations, did not hesitate to admit that Waterman divorced itself from all such responsibility:

"Q Captain, referring again to operations out in the Far East, you have described in some detail your own activities here to see to it that ships were in good condition when they were in Mobile or when you were around them elsewhere in the United States. What sort of affirmative program did the company have to see to it that ships were seaworthy when they left ports in the Far East, coming back to the United States?

"A The program to accomplish that is vested in the master or the chief engineer of the vessel -- the master primarily.

"Q Did you have any program at all with respect to checks or controls by any supervisory personnel in respect to the condition of the vessel when she started on her voyage back from a Far Eastern port to the United States?

"A We had no representatives to perform any such check in the Far East.

"Q To answer my question, is it true, then, that there was no program of that sort at all out in the Far East?

"A From shoreside personnel?

"Q Yes.

"A No.

"Q You mean no, there was no program?

"A There is a continuing program of the master and a continuing responsibility to maintain the seaworthiness of the vessel.

"Q I appreciate that, Captain. We all know that the captain has serious responsibilities in that respect. The question I am interested in finding out is whether there is any program of supervision by shoreside personnel out in the Far East.

"A Absolutely none." (T. 1172-1174.)

In short, the sum and substance of Waterman's nspection of shipboard navigational equipment consisted, at he most, of asking the master or chief mate, "Is your navi-ation equipment working satisfactorily?" (Captain Anthony, . 1156.) And if no deficiency were reported by the master, aterman would be unlikely to hear of it. Captain DeSanty estified that during his many years inspecting vessels he ad never observed a ship with as many things wrong with its avigational equipment at the same time as was the case with he CHICKASAW. (T. 820.) It is submitted that such a state f affairs can only be the result, and not an unexpected esult, of the vacuum created by Waterman's abdication of uthority.

3. Waterman's Improper Reliance upon the Coast Guard, Federal Communications Commission and Other Entities.

In an attempt to justify its failure to inspect and maintain the CHICKASAW's navigational equipment, Waterman consistently makes reference to the Coast Guard and FCC inspections, as well as to the services of their private contractors. Captain Murdock, Waterman's Port Captain, testified that Waterman relies completely upon RCA or Mackay to see that the radio direction finder meets FCC specifications each year. (T. 1365.) As explained by Captain Murdock, "We have hired people to do it and we consider that we have an automatic check in the FCC and it is being done." (T. 1376.) "We are meeting a very tough regulatory body, the FCC, and each year they examine the ship. This we consider a check." (T. 1377.)

Captain Anthony agreed:

"Q Did you have any routine for checking the accuracy of the radio direction finder other than the annual FCC check?

"A Only the question to the masters of the vessels, is their navigation equipment working satisfactorily." (T. 1210.)

The testimony of Mr. Hall, the FCC inspector, and Mr. Kroh, of RCA Service Company, shows how unfounded was

Waterman's complete reliance. Mr. Hall explained that the FCC's determination that the radio direction finder has been properly calibrated is based solely upon a statement received from the owner or the master:

"Q . . . at that time again all that the FCC gets is a piece of paper prepared by someone else saying that there has been calibration or that the calibration has been checked. Is that correct?

"A That is correct.

"Q So that if the ship continues on her way for her normal life, say, 20 years, it may well be with respect to a particular ship that at no time does the FCC ever get anything except a statement in writing that someone else has calibrated the radio direction finder?

"A That is correct." (T. 971-972.)

Mr. Kroh, of RCA, was emphatic in his testimony that neither he nor Mr. Hall made any comparison of RDF and visual bearings, as is required annually. (T. 974-975.)

Waterman, however, was apparently completely unaware of the nature of examination conducted by the FCC and RCA. Captain Anthony, Waterman's vice president in charge of operations, stated the following:

"Q Captain, yesterday Mr. Kroh of the RCA testified and Mr. Hall of the FCC testified. As I understand their testimony it was that you cannot

check the directional accuracy of the radio direction finder when the ship is in port . . . Are you familiar with the fact that routinely they do not check the accuracy of the RDF?

"A Am I familiar with the fact that they do not check the accuracy of it?

"Q Yes.

"A I have heard since the CHICKASAW grounded that they do not check the accuracy of it. I mean, I have heard this stated." (T. 1232, 1233.)

The story of the radar is much the same. Again, there is no record of periodic inspection or maintenance. Although there is a suggestion that Waterman relied to some extent upon Raytheon, Captain Murdock, Waterman's Port Captain, was frank to admit that he had never made any inquiry of Raytheon concerning the scope and type of their inspection. (T. 1370-1371.)

With respect to the fathometer, there is apparently no contention that Waterman ever relied upon anyone, except perhaps the Coast Guard. Inspection and maintenance were just nonexistent.

Throughout the trial, Appellant made much of the fact that the CHICKASAW had obtained a Coast Guard

certificate. The record clearly indicates, however, that the Coast Guard is not in the business of carrying out a shipowner's routine inspection and maintenance. LT Walsh, who actually inspected the CHICKASAW, made it clear that he relied solely upon shipboard personnel to inform him of any defects in navigational equipment. (T. 1303-1304.) Neither the fathometer (T. 1307), the radio direction finder (T. 1311), nor the radar (T. 1314) is normally turned on during a Coast Guard inspection. The foregoing was confirmed by Captain DeSanty, who performed hundreds of such inspections for the Coast Guard. In fact, as pointed out by Captain DeSanty, "inspection" is hardly a correct term, for the function of the Coast Guard is merely to determine that the required navigational equipment is on board and is reported by shipboard personnel to be in good operating condition. (T. 834-836.) Obviously, under these circumstances the Coast Guard cannot know more about a ship's equipment than is reported to them by her personnel. And if proper maintenance and inspection are not carried out by the shipowner, the mere obtaining of a Coast Guard certificate cannot cure the deficiencies.

In summary, the shipowner is under a duty to judge his own vessel's seaworthiness and may not rely upon the Coast Guard or any other body to discover defects that he could find with the exercise of reasonable care. As was stated by the Ninth Circuit in States Steamship Co. v. United States (The Pennsylvania):

"'In proceedings for limitation the owner may not escape liability by giving the managerial functions to an employed person acting as its agent, whether the person be corporate or otherwise.' Nor can the company escape responsibility for taking due precautions reasonably required by the apparent dangers by a mere reliance upon an assumption that the Coast Guard and the American Bureau of Shipping have taken care of these matters." 259 F.2d 458 at 470.

To the same effect, see Sabine Towing Company v. Brenan, 2 F.2d 490, 494 (5th Cir. 1934), cert. denied, 293 U.S. 611, 9 L.Ed. 701 (1934).

F. Appellant Has Failed to Carry its Burden of Proof as to Lack of Privity and Knowledge.

Returning to Appellant's expressed assignment of errors, it should be emphasized that Waterman failed to attack as being clearly erroneous Finding of Fact 6 that the master had been delegated the "managerial responsibility as respects such repairs (as of the fathometer) at the commencement of this voyage" from Yokohama, the appeal in this regard being limited to a claim of error of law that such a delegation by Waterman could result in imputed privity and knowledge.

The burden of proof under the Limitation of Liability

Act is on the owner, once negligence has been shown, to prove that "... it had no privity or knowledge of negligence, or that there was no privity or knowledge on the part of those to whom it had delegated the duties of commanding, maintaining, and operating the vessel." Austerberry v. United States (The C.G.R. 180), supra, 169 F.2d at 594. This burden shifts to the shipowner even if unseaworthiness is shown to be only one of the causes of the disaster. In re Eastern Transp. Co. (The Calvert), 37 F.2d 355, 358 (D.Md. 1929). See also Great Atlantic & Pacific Tea Co. v. Brasileiro, supra, 159 F.2d at 664-665.

As stated by Gilmore and Black, p. 705:

> "It seems reasonable that the shipowner, who invokes the Limitation Act, should bear the burden of proving the absence of privity or knowledge: as to that branch of the case he is the moving party and the facts are peculiarly within his knowledge. This is evidently the Supreme Court's view of the matter; in Coryell v. Phipps Justice Douglas commented, citing earlier cases: 'Thus respondent [shipowner] has satisfied the burden of proof, which is on those who seek the benefit of sec. 4283 [i.e., § 183], of establishing the lack of privity or knowledge.'"

III

Appellant has Failed to Prove that the Cargo Loaded Prior to December 25, 1961, is Subject to an Exception Under COGSA.

Waterman, for what we believe to be the first time in this case (and without citation of any authority), raises an issue that exoneration should have been allowed as to cargo loaded aboard the CHICKASAW before December 25, 1961, when Third Officer Jensen found the fathometer to be malfunctioning. See Specification of Errors No. 2. New matter may, of course not be raised on appeal,[27/] but, nevertheless, we would like to point out that there is no finding that this particular cargo was lost due to errors of navigation or any of the other exceptions to liability provided by COGSA (46 U.S.C. 1304). Instead, all cargo loss was found to have been due to unseaworthiness occurring at each of the ports in the Far East visited by the ship because of Waterman's failure to exercise due diligence (FF 4). Waterman thus failed to carry its burden of proof as to application of a COGSA exception to the entire loss, which necessarily means that it also failed to carry the same burden of proof

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27/ A/S Ludwig Mowinckels Rederi v. Accinanto (The Ocean Liberty), 199 F.2d 134, 145 (4th Cir. 1952), cert. denied 345 U.S. 992, 97 L.Ed. 1400 (1952); Minnich v. Gardner, 292 U.S. 48, 78 L.Ed. 1116, 1119-1120 (1933).

as to a part of the cargo loss. As Judge Learned Hand said in Great Atlantic & Pacific Tea Co. v. Brasileiro, 159 F.2d 661 (2d Cir. 1947), cert. denied 331 U.S. 836, 91 L.Ed. 1849 (1947):

> "If the (ship) owner would free itself from liability for such damage the doctrine of The Valescura (293 U.S. 296, 79 L.Ed. 373 [1934]) imposes upon it the hard burden of proving how much was not caused by the wrong, a burden whose discharge ordinarily carries such small hope of success that it may not care to make the attempt." 159 F.2d at 665.

As we point out above, the findings are that the generally poor condition of the fathometer pre-dating December 25, 1961, was due to the direct fault of Waterman. However, even if the findings did not contain this additional ground for denial of limitation (in FF 4), it would make no difference in a situation of common carriage of cargo under bills of lading, as opposed to a charter of a ship warranted on delivery as being seaworthy,[28/] that the unseaworthiness originated after the

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28/ COGSA does not apply to charters unless expressly incorporated (46 U.S.C. 1305); it only covers, by its own terms, cargo being carried under bills of lading (46 U.S.C. 1300, 1301 [b] and 1302. And the Limitation Act is not available to shipowners chartering out their vessels. Cullen Fuel Co. v. Hedger, 290 U.S. 82, 78 L. Ed. 189 (1933); (Cont'd.)

cargo was loaded aboard. Great Atlantic & Pacific Tea Co. v. Brasileiro, supra, 159 F.2d at 665. See also Petition of United States (The Edmund Fanning), 105 F.Supp. 353 (SDNY 1952), modified on other grounds, 201 F.2d 281 (2d Cir. 1953), where the sole unseaworthiness occurred at a time subsequent to the cargo's coming aboard.

Finally, 46 U.S.C. 1304, which sets out the various conditions for exoneration, certainly contemplates that the unseaworthiness can occur after cargo has been loaded since it extends exculpation to the shipowner for actions which could only take place after loading, such as deviation in certain circumstances and disposal of dangerous cargo before arrival at destination.

28/ cont'd

Capitol Transp. Co. v. Cambria Steel Co., 249 U.S. 334, 63 L.Ed. 631 (1919); Pendleton v. Benner Line, 246 U.S. 353, 62 L.Ed. 770 (1918); Luckenbach v. W. J. McCahan Sugar Ref. Co., 248 U.S. 139, 63 L.Ed. 170 (1918).

IV

CONCLUSION

The judgment of the lower Court denying limitation of liability is based upon two grounds, both of which are in full accord with existing case law, including decisions of this Circuit. The first ground is the imputation of privity and knowledge to Waterman of the master's failure to carry out the managerial duty of making the vessel seaworthy as to her fathometer in circumstances where Waterman itself could have performed that duty but declined to do so. The second ground is the direct fault of Waterman in failing to inspect the fathometer or institute any program for its maintenance, this resulting in the condition of "generally bad repair" as found by the lower Court.

The judgment of the lower Court is supported not only by the evidence respecting the fathometer but also by the evidence demonstrating Waterman's neglect of the radar, radio direction finder and deep-sea sounding machine.

Appellant's attack on causation is meaningless in the face of the Pennsylvania Rule, the burden of which has not been met, nor could it be met in the circumstances of this case.

It is therefore respectfully submitted that the decision of the lower Court must be affirmed.

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CERTIFICATE OF COMPLIANCE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules except as to the length of the brief, concerning which an Order has been entered permitting its filing.

PAUL GARY STERLING
Attorney

CERTIFICATE OF SERVICE

I, JOHN F. MEADOWS, attorney for Appellee United States of America, certify that on January 26, 1968, I served on Appellant Waterman Steamship Corporation a copy of the foregoing Answering Brief for the United States, by inserting three copies of said brief in an envelope, properly stamped, addressed and deposited in the United States Post Office, and addressed to:

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Affiant also certifies that on said date he served on Appellees Gay Cottons, Inc. and Salom Baby Wear, a copy of the foregoing Answering Brief for the United States, by inserting one copy of said brief in an envelope, properly stamped, addressed and deposited in the United States Post Office, and addressed to:

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Subscribed and sworn to before me
this 26th day of January 1968.

Deputy Clerk, U. S. District Court
Northern District of California